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S. Hrg. 103-605

REAUTHORIZATION OF THE OFFICE OF GOVERNMENT ETHICS—S. 1413

Reauthorization of the Office of Go... RING

BEFORE THE

SUBCOMMITTEE ON OVERSIGHT OF GOVERNMENT MANAGEMENT

OF THE

COMMITTEE ON GOVERNMENTAL AFFAIRS UNITED STATES SENATE

ONE HUNDRED THIRD CONGRESS

SECOND SESSION

ON

S. 1413

TO AMEND THE ETHICS IN GOVERNMENT ACT OF 1978, AS AMENDED, TO EXTEND THE AUTHORIZATION OF APPROPRIATIONS FOR THE OFFICE OF GOVERNMENT ETHICS FOR EIGHT YEARS, AND FOR OTHER PURPOSES

APRIL 20, 1994

Printed for the use of the Committee on Governmental Affairs

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HEARING ON S. 1413, REAUTHORIZATION OF THE OFFICE OF GOVERNMENT ETHICS

WEDNESDAY, APRIL 20, 1994

U.S. SENATE,
SUBCOMMITTEE ON OVERSIGHT OF GOVERNMENT MANAGEMENT, COMMITTEE ON GOVERNMENTAL AFFAIRS,
Washington, DC.

The Subcommittee met, pursuant to notice, at 2:08 p.m., in room SD–342, Dirksen Senate Office Building, Senator Carl Levin, Chairman of the Subcommittee, presiding.

Present: Senators Levin and Cohen.

Staff Present: Linda J. Gustitus, Staff Director and Chief Counsel; Barbara L. Strack, Counsel; Frankie de Vergie, Chief Clerk; Paul Brubaker, Minority Staff Director; and Paulina McC. Collins, Minority Professional Staff Member.

OPENING STATEMENT OF SENATOR LEVIN

Senator LEVIN. Good afternoon, everybody.

We are here this afternoon to consider S. 1413, a bill to reauthorize the Office of Government Ethics, which Senator Cohen and I introduced. The current authorization expires on September 30th of this year. It was last reauthorized in 1988 for 6 years.

OGE was created in 1978 as part of the Office of Personnel Management. Over the years, Congress has given OGE more authority and autonomy, making it a separate agency as of October 1st, 1989. That is one of the biggest changes since the last reauthorization.

In addition, through Executive order, President Bush and President Clinton have given OGE new responsibilities for guiding and implementing an effective ethics program throughout the executive branch.

The Subcommittee is well-acquainted with OGE and its staff and its operations. Since the last reauthorization, a new director of OGE has been confirmed, and several agency witnesses have testified before the SubCommittee on a variety of topics. The Subcommittee held an oversight hearing to look at OGE's review of agency ethics programs in 1990. The hearing disclosed some significant flaws which the new director has addressed.

OGE has been helpful to the Subcommittee in presenting its views on changes to the gift rules and on proposed changes to the so-called "revolving door" rules, among other matters. Our experience with OGE indicates that it is knowledgeable and professional.

There are a number of specific matters that we need to explore today. First, what is the appropriate time period for reauthoriza-

tion? In S. 1413, Senator Cohen and I have proposed 8 years, a position that I believe the OGE supports. The problem with reauthorizing for 6 years, like last time, is that it would place reauthorization in a Presidential election year. As we will hear later, Presidential transitions are very busy times for OGE, and it does not make sense to add reauthorization to that workload.

Another issue presented by S. 1413 is giving OGE gift acceptance authority for the first time. A Federal agency cannot accept gifts from non-Federal sources without specific statutory authority. Many agencies have such authority, but up to now, OGE has not been one of them. OGE has asked for gift acceptance authority to assist it in its training mission, and that is something that we will explore with Director Potts at today's hearing.

Finally, I want to explore OGE's budget and staffing. Both have increased substantially since their last reauthorization, although the growth has levelled off in fiscal years 1993, 1994 and 1995. Again, OGE's responsibilities have increased substantially since 1988, through its elevation to independent agency status, through legislation such as the Ethics Reform Act of 1989, and through Executive Order. We want to make sure that the increase in budget and staffing have proven worthwhile and find out what will be required in the years ahead.

OGE has a big job ahead of it—promoting ethics throughout the entire executive branch. That mission includes teaching about Government ethics, issuing regulations, giving advice to agencies and individuals, reviewing financial disclosure forms, auditing agency ethics programs, and making recommendations to Congress. We want to give OGE the tools that it needs to perform its job efficiently and effectively. To that end, we look forward to Mr. Potts' testimony.

Senator Cohen?

OPENING STATEMENT OF SENATOR COHEN

Senator COHEN. Thank you, Mr. Chairman.

I have a statement which is almost identical in its content, almost the same words, as a matter of fact. I want, however, to quote John Caldwell Calhoun who said: "The very essence of free Government consists in considering offices as public trusts, bestowed for the good of the country, and not for the benefit of an individual or party." I think that really sums up the obligation of all of us who serve in public office.

It was Cardozo, if I am not mistaken, who said that we in public service have to rise above the morals of the market place and that what is demanded of a fiduciary is "the punctilio of an honor the most sensitive." I remember reading those words many years ago and they remain true today.

As Senator Levin has indicated, the Office of Government Ethics (OGE) was created as part of a number of government reforms. He passed over the fact that he has been active and involved in the reauthorization of the creation of the Independent Counsel Act as well, which is part of our effort to maintain high levels of standards and independence of judgment in government. He also has been working on lobbying disclosure and gifts ban legislation. One subject you did not mention, Mr. Chairman, is that of honoraria,

which OGE right now is trying to come to grips with in terms of whether or not it is constitutional, and if found unconstitutional, what recommendations the Office might have as far as tailoring it to prevent all honoraria except for that which is earned outside the realms of an employee's official responsibilities and from groups that do not have interests related to the employee's particular executive branch agency. This is an issue we can cover during the course of the hearing this morning.

I would also point out that we are concerned about costs, but I think there is a justification for OGE's increased budget in recent years. OGE has gone from $1.8 million in fiscal year 1989 to $8.3 million in fiscal year 1994, but the office has also had substantial increases in responsibility. We want to hear about those and I look forward to hearing from all of you.

Thank you, Mr. Chairman. I ask that my full statement be included in the record.

Senator LEVIN. Thank you, Senator Cohen.

PREPARED STATEMENT OF SENATOR COHEN

Mr. Chairman, I am pleased to be here this afternoon to participate in today's Subcommittee hearing on the reauthorization of the Office of Government Ethics (OGE). The subject of today's hearing—ethics in government—brings to mind a quote by John Caldwell Calhoun: "The very essence of a free government consists in considering offices as public trusts, bestowed for the good of the country, and not for the benefit of an individual or party."

That is the way in which we expect our government officials to conduct themselves. Government service is a privilege and with that privilege come tremendous responsibilities. Public servants in all three branches of government have an important obligation to the citizens who have put their faith and trust in them. We expect our government officials to abide by a certain code of conduct, to adhere to high ethical standards so that our citizens will have confidence in the integrity of their government.

Unfortunately, however, many Americans do not have confidence in their government. As a result, the need for strict ethical standards, and vigilant oversight of compliance with our ethics laws, is as great as ever. Almost daily headlines purport allegations of "unethical" or "inappropriate" conduct by government officials in one form or another. The stories further erode the public's confidence in the integrity of their government officials which is already at one of the lowest points in our recent history.

Senator Levin and I have long been proponents of strong ethics laws. We have made many changes to strengthen the ethics laws since the Ethics in Government Act of 1978, which created OGE, was passed. We also authored the Independent Counsel provisions of the Ethics in Government Act which provides for the appointment of an independent counsel to investigate allegations of criminal activities by top level Executive Branch officials. We worked together to strengthen the revolving door laws and, more recently, Senator Levin and I worked to develop legislation to strengthen our lobbying disclosure laws. This legislation has been passed by both the House of Representatives and the Senate and is now in conference. Moreover, this Subcommittee has consistently sought to aid OGE in its mission of providing overall direction to the Executive Branch in developing policies to prevent conflicts of interest and ensure ethical conduct by Executive Branch officers and employees.

Each Executive Branch agency has primary responsibility for the administration of its ethics program. Strong leadership must, therefore, start at the top of every agency. Agency heads must demonstrate their firm commitment to high ethical standards and send a clear message that ethics violations will not be tolerated.

Today, we are once again going to evaluate how OGE is overseeing Executive Branch ethics programs. The reauthorization bill we are considering, which I introduced with Senator Levin last year, would reauthorize OGE for 8 years. This is a slightly longer reauthorization than we have sought in previous years. As in the past, we want to avoid the need to reauthorize OGE in the midst of a presidential election, or during the first year of a presidential term when a large portion of OGE's resources are devoted to the nominee clearance process.

The bill would also, for the first time, grant OGE gift acceptance authority to address the problem that arises when Federal Government facilities are not adequate either in terms of size or equipment resources to accommodate OGE's ethics education and training programs which are held around the country. This authority is intended to enable OGE to accept the use of certain non-Federal facilities, such as an auditorium that might be offered by a State or local government or a university, which may be better suited for OGE's needs.

This afternoon, we will examine OGE's budget and staffing levels. As I have often noted in the past, the Office of Government Ethics is a small office with large responsibilities. Over the years, we have imposed more responsibilities on OGE and we haven't always provided the necessary staff or resources to carry out those responsibilities. Specifically, I would note the additional functions OGE had to perform when it became an independent agency in 1989 and in complying with the Ethics Reform Act of 1989. While OGE's budget has increased rather significantly since we last reauthorized OGE in 1988, OGE still has a lean budget with which to operate when you consider the critically important responsibilities the agency has. That said, in light of looming budget deficits, OGE, like all agencies will undoubtedly be called upon to meet its responsibilities in the most cost-effective manner possible.

Mr. Potts, I want to welcome you. In your nomination hearing before the Governmental Affairs Committee, you testified that you would do your very best to justify the confidence President Bush placed in you by discharging the duties of Director of OGE with integrity, fairness, and good judgment. I commend you for your commitment to these laudable goals and for your performance since you assumed the position of OGE Director.

Restoring the public's trust and confidence in the integrity of their government is not an easy task. Mr. Potts, I look forward to hearing your testimony today and appreciate your continued cooperation in working with the members of this Subcommittee to ensure strict ethical standards in government.

Senator LEVIN. We welcome our witnesses today. Steve Potts has been director of the Office of Government Ethics since 1990. You are a veteran by now, and have overseen the Office through this growth spurt which we have referred to, through a Presidential transition; you have even survived a bunch of appearances before this Subcommittee. So you are a veteran.

We are glad to have you with us today. We will put your entire statement in the record, and perhaps you can summarize, but proceed as you wish.

TESTIMONY OF HON. STEPHEN D. POTTS,[1] DIRECTOR, OFFICE OF GOVERNMENT ETHICS, ACCOMPANIED BY GARY DAVIS, GENERAL COUNSEL; JANE LEY, DEPUTY GENERAL COUNSEL; AND JACK COVALESKI, ASSOCIATE DIRECTOR FOR PROGRAM ASSISTANCE AND REVIEW

Mr. POTTS. Mr. Chairman, thank you, and thank you, Senator Cohen.

First, I would like to introduce the members of my staff who are at the table with me. On my right is Jane Ley, who is the deputy general counsel. To my left is Gary Davis, who is the general counsel, and on the far left, Jack Covaleski is the associate director for program assistance and review.

I would be remiss if I did not take this opportunity to say how very fortunate I am to have such outstanding staff members. When I came in, all three—Jane and Gary and Jack—were there, in place, and made my job so easy by comparison if I had come on board with people who either did not have the knowledge and commitment or the experience. But they had all of those ingredients,

[1] The prepared statement of Mr. Potts appears on page 22.

and they have just been incredibly supportive. I wanted to publicly commend them for all their fine work.

I do want to thank you for the opportunity to appear today to present the administration's request for reauthorization of the Office of Government Ethics for a period of 8 years and to provide for gift acceptance authority for OGE.

In 1988, OGE was reauthorized for 6 years through fiscal year 1994. The purpose for this term was to avoid having a reauthorization fall within an election season or during the first year of a Presidential term, when substantial resources of OGE are devoted to the nominee clearance process.

Now, the bill, S. 1413, provides for reauthorization of OGE for a period of 8 years, as the Chairman has indicated; that would be through fiscal year 2002. This 8-year period avoids both a Presidential election year and the first year of a Presidential term.

Another benefit of an 8-year reauthorization is the savings of staff time and resources that would be expended for reauthorization hearings and legislation if we had a shorter period of reauthorization.

An additional provision of the legislation is the authorization of gift acceptance authority for OGE within certain restrictions and requirements. The director may accept on behalf of the United States contributions of money, use of facilities, personal property and services to further the mission and programs of OGE.

This proposed gift acceptance authority would be used primarily to support OGE's education and training program. In carrying out its training mission, OGE provides ethics training at locations both in Washington, DC and throughout the United States. Federal Government facilities are sometimes inadequate in terms of size or equipment resources to support our training efforts. In some cases, we find that private or State or local Government facilities may be better suited to our needs and are available to us.

This gift acceptance authority would enable OGE to accept the use of these facilities and the services of technical and other personnel, such as projectionists and custodians, if offered by someone other than a Federal agency. Equipment and material could be accepted under this authority.

Now, language in the bill precludes acceptance of any gift that would attach conditions inconsistent with law or regulation, or that would require the expenditure of funds not available to OGE. In addition, the director of OGE is required to issue rules establishing criteria governing gift acceptance to assure that any gift will not compromise the integrity of the agency's programs or even create unfavorable appearances. OGE will take appropriate steps to ensure that the acceptance of any gifts will be carefully controlled and will be scrutinized for any real or even apparent conflicts with the mission of the office or the duties of any individual employees.

In the rest of my remarks, I will focus, as you requested, on two aspects of OGE's responsibilities. One is program review, and the second is the Presidential transition.

First, as to program reviews, at an OGE oversight hearing in 1990, Senator Levin, you and Senator Cohen urged OGE to be more assertive in gaining compliance from agencies on recommendations made in our program reviews. The problem was

that OGE frankly lacked the personnel to conduct the reviews, and that fact was noted in a General Accounting Office review of OGE's oversight role.

With the support of the administration and the Congress, OGE did receive the financial and personnel resources that we needed. Resource increases were primarily applied to strengthening the program review function and the agency desk officer system.

Management analysts in the Office of Program Assistance and Review monitor executive branch agency ethics programs and employee compliance with ethics laws and regulations through periodic ethics program review. Ethics specialists, who serve as desk officers, assist agencies in the development, maintenance, and improvement of agency ethics programs.

Desk officers often assist agencies in implementing ethics program recommendations stemming from the reviews conducted by the management analysts. Through the desk officer system, established in 1990, we found that we can become more quickly aware of agencies with problems than if we were operating through reviews alone. If these problems cannot be solved through the desk officer's intervention, we schedule a program review. Also, our staffing levels now permit us to perform a 6-month follow-up review after each review to ensure that our recommendations have been implemented.

Each year, OGE prepares a planned program of agencies to be reviewed during the coming year. Agencies are included in this plan for many reasons, including whether the ethics program appears to have problems or whether the agency has a particularly critical mission. A major factor is the amount of time that has elapsed since the last OGE review.

The purpose of our review is to make sure that basic systems are in place in the ethics program and that they are functioning effectively.

We find that agency ethics programs have improved dramatically since the passage of the Ethics in Government Act of 1978, with more support staff and resources provided to the programs in most agencies.

Currently, however, the trend toward stronger programs may be changing due to budget cuts in agencies. Agencies are depending on OGE far more often to help them with their problems. Some are starting to be in a position in fiscal year 1995 where they may have to pick and choose which elements of the program to operate if staff is cut further.

During 1992 and 1993, OGE issued 80 reports to designated agency ethics officials, making recommendations to strengthen ethics programs. Copies of these reports also were sent to the agency heads. These reports covered ethics programs in 104 departments, agencies, offices, or components, and 27 regional offices and military bases. For sake of comparison, this compares to 17 reports issued during the 1990–1991 period.

OGE also increased follow-up reviews 6 months after each report to ensure that the agencies implemented the report recommendations.

Now let me turn to the question of the Presidential transition. A Presidential transition year presents special responsibilities for

the Office of Government Ethics. Prior to an election, OGE briefs candidates' staffs on the ethics laws covering high-level appointees and how OGE works with new appointees and the White House Presidential Personnel Office in the appointment process. More particularly, the financial disclosure statements of individuals nominated by the President for positions requiring confirmation by the Senate are reviewed by the White House Counsel's Office, agencies, and OGE prior to the nominee's confirmation hearings.

Prior to their confirmation hearings in the Senate, the personal finances of individuals nominated are thoroughly analyzed, problem areas are discussed with them—that is, both the ethics officials and the nominees—and appropriate remedial steps are fashioned or they are agreed to in order to avoid conflicts between the nominees' financial interests and their prospective Government positions.

At the end of 1992, OGE again geared up for a Presidential transition. This time, however, the process required more resources than in the past. Not only did the new incoming administration need assistance with the nominee financial disclosure and conflict of interest review process, but because this transition involved a change of political party, there was a substantial increase in the need for information on negotiating for employment and for guidance on post-employment rules for the members of the previous administration.

From our program perspective alone, we do not at this time believe there are any administrative changes that would facilitate future Presidential transitions, nor do we have any recommendations as to legislative changes.

However, having said that, we recognize that the status of transition staff and the teams of an incoming nonincumbent President vis-a-vis the conflicts and information statute has and will continue to cause concern.

The Presidential Transition Act does not speak to this issue. At some other time, in some broader forum, that issue might be an appropriate item for a more complete discussion.

Finally, we believe that the administration and the Congress should continue to work on eliminating and/or consolidating the many forms required to be filed by Presidential nominees, especially those requiring substantially the same information, but in a different format.

Just on a personal note, I might say that is, frankly, a bee in my bonnet. I can remember when I was going through the process, and I completed all of the forms, which I felt were incredibly large in number, for the executive side. Once I completed them I really felt that had to be the last forms I will have to complete during this process. And then, of course, I got a new batch of forms from the Committee, requiring disclosure of the same information. But some questions are cast in just a little different light so that—even though it is obnoxious to have to copy answers all over again—you could not even do that.

Just for example, to make my point, we have to fill out an SF 278, which is a financial disclosure statement, on which you report all of your interests by categories of value. But then, to the Senate, I had to give a net worth statement. Of course, it meant getting

all of that information back out, and then, as of a certain date, giving a precise value for the various security holdings and so on.

So I still, to this day, cannot see why the information in the SF 278 would not have been sufficient, or at least that there would not have been some agreement between the executive branch and the Senate committees about what information is going to be required.

Obviously, that is always subject to a particular committee saying we have a reason to want additional information from this nominee, demanding it and getting it. But I think as the standard sort of SOP, there ought to be some discussions between the Senate and the executive branch about trying to rationalize the forms that are filled out by nominees.

In closing, I would like to briefly summarize OGE's current resources. Since its inception, the Office of Government Ethics has been small by any standards. Its programs have been focused and leanly staffed. At the present time, OGE has an appropriation of $8.3 million for fiscal year 1994 and has allocated a personnel ceiling of 93. The request in the President's budget for OGE for fiscal year 1995 is for $8.1 million and a personnel ceiling of 93.

This concludes my statement. I will be happy to respond to any questions you might have about OGE or about our programs or about the legislation reauthorizing our Office.

Senator LEVIN. Thank you, Mr. Potts.

First, on the last subject you raised—the budget. What is your expectation relative to the OGE's budget and staffing during the next 8 years—level funding, reduced?

Mr. POTTS. I would say, based on the conversations we have had with OMB, assuming no changes in the laws and so on, that we would expect it is level, without allowing for inflation. I think in terms of staffing and funding in today's dollars, that we are pretty comfortable with the amount of money that we have.

We think we are, because we are going down a little bit in fiscal year 1995. It is going to be very tight for fiscal year 1995, so we are hoping to get a little margin of error.

Just to give you one example, we had a theft of $11,000 worth of equipment. In our budget, our entire new equipment budget happens to be $11,000, so it just went out the window with the thief. So that shows how little margin of error we have in our budget.

Senator LEVIN. Have you given thought to the possibility of a permanent reauthorization?

Mr. POTTS. Well, I guess in my dreams, I have, but I have not really talked about it with staff.

Senator LEVIN. Do you think it is impractical to seek it?

Mr. POTTS. I do not really know the answer to that. I think it would make sense. I cannot see the possibility that at whatever level of staffing and funding—I cannot imagine that we would be without an Office of Government Ethics in the future.

Senator LEVIN. On the Presidential transition issue, you have said you agree that the forms are burdensome, that you have been through it yourself, and you described to us your lack of being able to see why you must have a 278 and a net worth form, one for the executive branch and one for the Senate.

Have you proposed to the relevant Senate committees and to the relevant executive branch office that there be a combined form? Have you explored that possibility just in that one little area?

Mr. POTTS. I was a member of the committee on the appointment process, and this was one of our recommendations. After the transition, I spoke to a member in the White House Counsel's Office who had also been a member of that commission and suggested that the time might be particularly propitious to pursue this. But that was the extent of what I did, and I do not know whether anything has happened or not.

Senator LEVIN. Can you identify all of the forms for us now; do you know them by heart, how many different forms have to be filled out by a nominee?

Mr. POTTS. I do not.

Senator LEVIN. Would it be 4, 5, 6 forms?

Mr. POTTS. At least, yes, I would say, both for the Senate confirmation committee as well as on the executive branch side.

Senator LEVIN. I would think it would be useful for you or somebody to make a specific proposal to the relevant agencies that are requiring the forms. In the abstract, it seems to me that what you are saying sounds awfully sensible. I have a hunch there is a lot to what you are saying, too, not just in the abstract, but in the real world. But in order to pierce through it requires somebody to go through the 6 forms, 8 forms, or whatever it is, and say, look, you are asking for the same information on a somewhat different form; do you really have to do this? Or, you are asking for exactly the same information; why can't you just use the same form? Why can't all of you get together on one form, or whatever it is, and consolidate?

But it would take somebody, I think, in your office and in your position to actually go through forms, and highlight, make it clear to the various agencies what you are talking about. Otherwise, everybody is just going to continue to do what they are doing. Someone has got to kind of be the advocate for the nominee. The nominees are not good advocates for themselves; they are trying to get appointed, confirmed. So they need an advocate. And once it is done, everyone says, gee, I am glad that thing is over, and then they are busy with their work, and they are not going to spend a lot of time trying to correct it for the next person, because they have other things to do. Hopefully, the nominees are busy once they have been confirmed.

But I do not know if there is an advocate for form consolidation for the nominee process, but you are in as good a position as anybody; you have been confirmed, and your testimony addresses it.

So I would suggest that maybe you could come up with a proposal, send us a copy, and maybe we can be helpful in that process. I am sure we add to the burdens in the Senate, and you have already identified it. Maybe we can help you, because we know there is a problem.

Mr. POTTS. Wonderful.

Senator LEVIN. If you could do it at our request, if you want to lay it on us, however you want to do it, but that you make a proposal for form consolidation and elimination in this process.

Mr. POTTS. Wonderful. I am enthusiastic about the idea.

Senator LEVIN. One tiny question in that area. Is that 278 form that you mentioned filled out by people before the decision has been made to nominate them, or after the decision has been made to nominate them?

Mr. POTTS. It is actually before. The White House gets that information and takes a look at it, and it is part of the decision process of whether to nominate.

Senator LEVIN. Because I can see where the Senate might want more detailed information once somebody has been nominated. For that matter, I can see where the White House might want more detailed information once they have decided to nominate someone. But if the 278 is filled out by people before the decision has been made, I can see why it would be better to get categories of value, because why put people to the burden of all the specificity if 99 out of 100 of those 278s are never going to be used by anybody. So that is just a thought.

You have made reference to blind trusts, and I have always been intrigued by that subject because I do not think we use them as often as we should. It seems to me that every once in a while, there is a newspaper article about somebody who has owned stock and who may be in a position where they could benefit from inside information or whatever. What are the rules on——

Senator COHEN. I thought we were not going to talk about Whitewater.

Senator LEVIN [continuing.] What are the general rules about blind trusts?

Mr. POTTS. Well, let me first say that I think one of the improvements in the system has worked against the use of blind trusts somewhat, because now we are able to issue certificates of divestiture which postpone the realization of capital gains if we require a nominee to divest a certain security. So it is not quite like it was in the old days, where they did not want to divest, sometimes just because they would get hit with a huge capital gains tax. That has given another avenue for people to use rather than doing a blind trust.

The basic principle of the blind trust is that we require the person who wants to go that route—and these are usually high net worth people—that all of their assets are turned over to the trustee. The trustee must be independent, and not someone who is a friend or a member of the family or something like that, but truly is independent of the creator of the trust. Then in the trust instrument, the trustee has sole power to sell the assets and reinvest them in other securities and so on. We are scrupulous about making sure that the trustee is truly independent of the creator of the trust.

Senator LEVIN. What is the standard for when you recommend that somebody create a blind trust?

Mr. POTTS. To my knowledge, on those, it has always been a case of a very intense discussion and negotiation between the nominee, the ethics officials in the department or agency where that person is headed, and our staff. And frankly, we realize it is costly to set up a trust like that, that it is somewhat cumbersome. People are giving up control of their financial assets that, quite often, they have accumulated over their lifetime of work. It is not something

that we really encourage. We try to find other avenues first to resolve those kinds of issues.

Senator LEVIN. So there is no standard that is in the manual or any of your documents to say that if a nominee to a Cabinet position, for instance, has stock in companies over a certain amount or of a certain type, that that person should create a blind trust. There is no general standard.

Mr. POTTS. There is sort of a minimum, that they have to have assets of at least $500,000 before we would even consider it. But above that, it is a matter of negotiation.

Senator LEVIN. Thank you.

Senator Cohen?

Senator COHEN. Just a couple of questions, Mr. Potts.

I want to commend you for the efforts you have made since your confirmation back in 1990 when you were before us at the full Committee. Senator Levin and I expressed our concerns at that time about the effort of OGE to gain compliance from the agencies and the recommendations made with respect to the agencies' ethics program reviews. As I recall, you were averaging 11 reviews per year in 1989 and 1990. Since that time, in response to the kinds of questions that we raised you have increased to about 40 in each of the last 2 years.

Mr. POTTS. That is right.

Senator COHEN. We want to commend you for making that effort. Will you continue to seek even more reviews in the coming years.

Mr. POTTS. I would not say that we will necessarily do more. I think that we have learned how to be a lot smarter about the way we do the reviews. And to be candid, I think when we were here before, we were saying we expected a cycle of doing all of the agency reviews on a cycle of 3 years.

What we have found is that we can do it about every 4 years, but with much more intense involvement from our desk officers. Because we have gotten very well-trained desk officers who have a portfolio of agencies and are in constant contact with those ethics programs, we are in a much better position now to kind of pick out the weaknesses in a department's or an agency's programs to try to keep it fixed as we go along. But then, if one really begins to fall down for whatever reasons, we are able to identify that—kind of like an early warning system—and then we will put them on our list. Whether it has been a year or 2 years or whatever since the last review, we will go back in there for a full-scale program review.

Senator COHEN. In terms of the gift acceptance regulations or powers that you will have under this legislation, what sort of gifts do you anticipate receiving? By the way, I would point out that many other agencies have this authority, do they not?

Mr. POTTS. That is right.

Senator COHEN. Do you know how many?

Mr. POTTS. I was talking to Jane Ley just before we came over here, and the information we have is from our agency questionnaire. It was a question we asked, so our information is just based on what people have told us. That number was 67 agencies.

Senator COHEN. I assume these gifts would involve use of facilities?

Mr. POTTS. Exactly. If we go into San Antonio, TX for a regional training, usually, that will include ethics officials of a bunch of agencies. That is the way we do it in the region. There will be somebody from the Air Force base and the IRS there, and the Department of Labor and so on, and they will all come in for that training. But they may not have, themselves, a facility that would be appropriate if we have 100 people who are going to be trained. But it may very well be that we could in effect borrow the San Antonio Municipal Court, or some meeting room that they have, which they are happy for us to use. But now, since it has a value, we are not allowed to accept it even for free.

Senator COHEN. I was only being semi-facetious when I mentioned Whitewater in passing before. It is important for the record, at least, to reflect that this is an issue that is of concern to you in terms of allegations made about potential violations of inappropriate contact between one agency and another correct?

Mr. POTTS. We received a letter from Secretary of Treasury Bentsen, asking us to provide advice to him on the appropriateness of those contacts. We had actually received other inquiries from the House, and we responded, saying that we are not an investigatory agency. Furthermore we had been in touch with Independent Counsel Fiske, and he had asked us to not proceed until he had either completed his investigation or had gotten so far along in that investigation that he was comfortable that anything that we did, or more specifically, that the Inspectors General of Treasury and RTC could proceed with their administrative investigations. And we have, then, subsequently been in touch with the Inspectors General of those agencies, apprised them of our conversation with Fiske, and said that we will stand ready, if you start your investigation, to advise you as to what are the applicable laws and regulations that you ought to be considering.

Senator COHEN. So you have agreed to basically put everything on hold until he completes his investigation?

Mr. POTTS. Or we will stay in touch. If he reaches a point where he says we have gone far enough that it is OK for you and the Inspectors General to start, then that would be fine.

Senator COHEN. What sort of undertakings would you make at that time? You say you are not an investigative agency, obviously, but what would you do?

Mr. POTTS. Our role would be to in effect be the consultant on the laws and regulations that might be implicated for the investigators in the IG offices of the RTC and Treasury. So in other words, we could point out to them, here are the kinds of laws that you ought to be looking at in a factual context to see whether there was any kind of violation based on your investigation.

Senator COHEN. In other words, Secretary Bentsen sends a letter to you, you in turn prepare some kind of a memorandum of applicable rules, either laws and/or regulations, and then you alert or call those into the awareness of the IGs.

Mr. POTTS. I am not sure it would be quite that formal. I think it might very well be that the people on the IG staffs and the people from our side would just sit down and talk about who is going to be doing what, and we would provide the kind of legal counsel-

ing as to the direction that they ought to be taking and things that might possibly be implicated.

Senator COHEN. So do you, in essence, provide advisory opinions? In other words you look at the facts or the allegations, look at the applicable laws or regulations, and give an advisory opinion as to whether or not there were transgressions?

Mr. POTTS. Actually, it would not work quite that way. The way I would see it playing out would be after that kind of meeting or counseling and so on, the Inspector General's staff would proceed to do their factual investigation. They then write their reports. That is the customary way. They write a report giving the results of their investigative work. If they found that there was sufficient information warranting some sort of criminal action, then of course, that would be referred over to the Department of Justice. If it did not reach that level, but was some sort of transgression, let us say, of the code of conduct, the norm there would be to refer it for administrative action within that body. In other words, the person who is employed by Treasury would be subject to potential administrative action by the Department of Treasury. The same would be true at RTC; the same would be true at the White House.

Senator COHEN. I guess what I am getting at is, is your function simply an administrative one of saying here are the rules and the laws as we understand them and furnishing those to the IG? What is the function of your office under these circumstances?

Mr. POTTS. Then, having said what I said, we would follow that to make sure that the agencies were doing their jobs, because we do have corrective action authority. There was a case in the last administration that maybe illustrates the point, with the chief of staff, where an investigation was done, and actions were proposed against the chief of staff and the reimbursement for misuse of Government transportation. Then we reviewed that report and found that we felt that there were additional instances where there should have been reimbursement, and rendered our opinion on that. The ultimate result was that the chief of staff did reimburse the Government additional amounts.

So we are not totally passive, is what I am suggesting. We would be watching what is going on to make sure that it is handled in a proper way.

Senator COHEN. Mr. Davis and Ms. Ley are desperate to get in touch with you.

Mr. DAVIS. Senator, I would just make one point, and that is that there are allegations that there was ethics advice given in some of those instances, so that any investigative body would not have the benefit of the ethics office, perhaps because of the allegations. We would also serve in that function if the ethics office might be involved, and we certainly could advise the Inspector General staff on any aspect that they would normally go to their own ethics folks for.

Senator COHEN. Ms. Ley?

Mr. POTTS. Ms. Ley has given me a note—which is absolutely correct—that after the IG writes its report, we would advise the Secretary, Secretary Bentsen in this case, on the applicability of the standards to those facts.

Senator COHEN. Of course, we fully understand the need to turn to staff and subordinates. We would not be able to function up here without those sitting behind us.

Mr. Covaleski, you have been sitting there in total silence. Do you have anything to add?

Mr. COVALESKI. He has done an excellent job so far.

Senator LEVIN. We rely on staff to tell us that, too.

Mr. COVALESKI. That goes for the last 4 years.

Senator LEVIN. Just a couple more questions. There is a waiver of conflict of interest law applicability which is permitted under 18 USC 208(b), providing that employees consult first with the OGE on these waivers.

Mr. POTTS. Right.

Senator LEVIN. The number of these waivers has gone up dramatically, and I am just curious as to why that is. There were only 25 in 1990, and then it went up to 123 in 1991, and then 646 in 1992, and then back down to 409 in 1993. But still, it looks like there was a big jump. Did something happen back then? Was there a change in law, or what?

Mr. POTTS. One aspect, the law did change on 208(b)(3), which allows for waivers for the special Government employees serving on advisory committees. They are allowed to make a determination—that is, the agency where this person is going to serve can make a determination that the conflict is not so serious as to outweigh the need for the person's service on the advisory committee. So that has been quite heavily used.

But I might also say that we are keenly aware of the numbers of waivers and how they have accelerated, and we have in process right now a regulation which I think is going to—well, it definitely will if it is adopted—alleviate the need for such a high volume of waivers. In other words, we are trying to describe some types of situations that would just be across the board exempted and/or waived, and that would apply to all agencies and department. It would be right there in the regulation, and employees would not have to get an individual waiver.

The status of that is that our staff has completed a working draft. We submitted it to the Department of Justice, as we are required to do, just for a quick look to make sure that we are not just totally headed in the wrong direction. They came back and said that they were satisfied at that superficial level. Then, 2 weeks ago, we had a meeting of a group of ethics officials from a variety of departments and agencies having previously given them a copy of this draft. We wanted to make sure that what we were doing made sense in a practical way and was going to really be of help to them. And it was, I would say, a very spirited meeting, because it is something that—if we can pull this off successfully—will really help in reducing their work load. And of course, that is critically important right now, as most of them are having their resources cut back.

So we gave these agencies 3 weeks after the meeting to submit comments and suggestions to us, and about a week after that, we will get back together with them, redraft, and then get back to Justice with a final product.

Senator LEVIN. OK. If you could just keep us informed, then, that would be helpful.

The ethics officials in the agencies generally are very positive about your office, by the way.

Mr. POTTS. I am glad to hear that.

Senator LEVIN. Before I tell you some of their complaints, let me put in a positive note.

Mr. POTTS. They are the customers.

Senator LEVIN. There are a few complaints or suggestions that we have received. One has to do with the financial disclosure forms, similar to the Presidential appointee forms, but this has to do with the people who are in office and their financial disclosures. The DAEOs feel there is just too much paperwork, too much detail required; too many times, they have to go to people with a bunch of nitpicking questions.

Is there anything that can be done in that area, do you think? Does the same problem exist in that area as exists with the Presidential appointees and the confirmation process?

Mr. POTTS. Let me make two observations. One is that we have gone over our process a number of times and talked to various people in the field and other departments and agencies to make sure that we were not just going back where they had omitted something that was pretty obvious.

The most important thing that we have done there, though, is that we are in the process of publishing an SF–278 Reviewer's Reference Manual. Here is a copy of it, right here. This is more than you ever wanted to know about reviewing an SF–278. But I think that this manual is going to really be a tremendous aid, particularly to the inexperienced reviewers. In all honesty, what we find is that you go into an agency's ethics office, and they have a number of functions, one being review of financial disclosure statements. But that is viewed by most of them as kind of the real scut work, whereas the counseling of employees and doing certain other things is the more sophisticated, desirable work.

So as a result, what quite often happens is the least-experienced person in the office gets the job of reviewing the financial disclosure statements. That is a heck of a job for someone who really, let us say, is not knowledgeable about financial markets, and does not know the functions of his agency as well as others, et cetera.

But I think with this manual, which has a very good index and so on, if you have a particular problem, you can pinpoint and go right to a discussion and disclosure of exactly how it should be handled. And then, of course, we are always available for the person who does not get the answer there, for further consultation. But, this will answer a tremendous number of those questions.

Senator LEVIN. It looks kind of intimidating, actually.

Senator COHEN. I was going to say, whenever you get a book that big, with that much space left between the rings, it seems to me you are sending a signal to get a lot of fillers coming up.

Mr. POTTS. Well, we are hoping not to.

Senator LEVIN. Future growth, yes. I agree with Senator Cohen. If I were you, I would put that in a smaller binder.

Mr. POTTS. That would make it look thinner.

Senator LEVIN. Absolutely. Psychologically, that is the wrong thing to send anybody, I would guess. By the way, that may be the most significant suggestion coming out of this hearing today, to have a smaller binder. I hope not. I hope there are more significant suggestions, but you never know. It is the practical things sometimes which are noted.

My question had to do with the form itself. Is there anything that can be done relative to the form itself, to simplify it?

Mr. POTTS. It would really require amending the law. I mean, basically, what our form requires is what is set forth in the law.

Senator LEVIN. If your experience is that the law requires things which we do not need, or in a form in which we do not need them, let us know.

Mr. POTTS. OK. One of the things that we do have going right now, Senator, on the confidential system—and of course, our regulation on that is newer than the public financial system—we have what is called a single-issue audit going on right now. Jack Covaleski has a team that has gone into or will go into about a dozen departments and agencies and just zero in on what is their experience with the confidential financial disclosure system. We will write a report about that single issue. There again, one of the things that started the concern was that we felt after the first year, the number of occasions where a confidential filer would be found to have a conflict or would have to divest or whatever, was quite infrequent; we wanted to check out that sort of intuitive feelings. If that is the case, it might mean that rather than file a complete form after the first year, some sort of certificate of compliance or something simpler might be in order. So we are taking a hard look at that.

Senator LEVIN. Just a couple of questions on honoraria, and then I am done. On the issue of honoraria, we have had some pending legislation to fix the ban. We have not been able to get it enacted for a number of reasons, but in the meantime, a court has thrown out the ban as applied to the executive branch, based on the First Amendment. That court opinion was upheld on appeal, and then the Supreme Court has just recently agreed to review that decision by the court of appeals.

Did you have any role in the Justice Department's decision to seek Supreme Court review?

Mr. POTTS. We were consulted by the Department of Justice about whether to seek review by the Supreme Court.

Senator LEVIN. Can you tell us what you recommended? Are you free to tell us?

Mr. POTTS. I think so. We did not feel like it was appropriate.

Senator LEVIN. Since the case is now in the Supreme Court, do you still support a legislative fix, or do you suggest that we wait?

Mr. POTTS. I would be delighted if there were a legislative fix. I think that is really what should be done and should have been done long ago.

Senator LEVIN. Even though the case is pending in the court.

Mr. POTTS. Right.

Senator LEVIN. Further questions, Senator Cohen?

Senator COHEN. No questions.

Senator LEVIN. Mr. Potts, and your colleagues, we thank you very much. We will try to mark up this reauthorization promptly. Thanks for your good work, and keep it up.

Mr. POTTS. Thank you very much. Thank you both.

[Whereupon, at 3:01 p.m., the Subcommittee was adjourned.]

II

103D CONGRESS
1ST SESSION

S. 1413

To amend the Ethics in Government Act of 1978, as amended, to extend the authorization of appropriations for the Office of Government Ethics for eight years, and for other purposes.

IN THE SENATE OF THE UNITED STATES

AUGUST 6 (legislative day, JUNE 30), 1993

Mr. LEVIN (for himself and Mr. COHEN) introduced the following bill; which was read twice and referred to the Committee on Governmental Affairs

A BILL

To amend the Ethics in Government Act of 1978, as amended, to extend the authorization of appropriations for the Office of Government Ethics for eight years, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Office of Government Ethics Authorization Act of 1994".

SEC. 2. GIFT ACCEPTANCE AUTHORITY.

Section 403 of the Ethics in Government Act of 1978 (5 U.S.C. App. 5) is amended by—

(1) inserting "(a)" before "Upon the request"; and

(2) adding at the end thereof the following:

"(b)(1) The Director is authorized to accept and utilize on behalf of the United States, any gift, donation, bequest, or devise of money, use of facilities, personal property, or services for the purpose of aiding or facilitating the work of the Office of Government Ethics.

"(2) No gift may be accepted—

"(A) that attaches conditions inconsistent with applicable laws or regulations; or

"(B) that is conditioned upon or will require the expenditure of appropriated funds that are not available to the Office of Government Ethics.

"(3) The Director shall establish written rules setting forth the criteria to be used in determining whether the acceptance of contributions of money, services, use of facilities, or personal property under this subsection would reflect unfavorably upon the ability of the Office of Government Ethics or any employee to carry out its responsibilities or official duties in a fair and objective manner, or would compromise the integrity or the appearance of the integrity of its programs or any official involved in those programs.".

SEC. 3. EXTENSION OF AUTHORIZATION OF APPROPRIATIONS.

The text of section 405 of the Ethics in Government Act of 1978 (5 U.S.C. App. 5) is amended to read as follows: "There are authorized to be appropriated to carry out the provisions of this title and for no other purpose such sums as may be necessary for the fiscal years beginning with fiscal year 1995 and ending with fiscal year 2002.".

SEC. 4. EFFECTIVE DATE.

This Act shall become effective upon October 1, 1994.

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STATEMENT OF

STEPHEN D. POTTS
DIRECTOR, OFFICE OF GOVERNMENT ETHICS

ON

S. 1413, REAUTHORIZATION OF THE OFFICE OF GOVERNMENT ETHICS

BEFORE THE

SUBCOMMITTEE ON OVERSIGHT OF GOVERNMENT MANAGEMENT

COMMITTEE ON GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

ON

APRIL 20, 1994

MR. CHAIRMAN, AND MEMBERS OF THE SUBCOMMITTEE:

Thank you for the opportunity to appear today to discuss the reauthorization of the Office of Government Ethics (OGE).

I would like to take a few minutes to provide some background on OGE and outline its responsibilities.

The Office was first established in 1979 as part of the Office of Personnel Management. It became a separate agency on October 1, 1989. The Office is responsible for providing "overall direction of executive branch policies related to preventing conflicts of interest on the part of officers and employees of any executive agency."

To carry out this responsibility the work of OGE tends to fall into six general areas: regulatory authority, financial disclosure programs, education and training of employees, guidance and interpretation of laws and regulations, enforcement within agency ethics programs and evaluation of ethics laws. OGE is organized by program area: Office of General Counsel and Legal Policy, Office of Program Assistance and Review, and Office of Education. These units are supported by a small administrative staff who provide for personnel, budget, administrative services and information management.

The Office of General Counsel and Legal Policy is responsible for establishing and maintaining a uniform legal framework of Government ethics for executive branch employees, and for assisting agencies in its implementation. Management analysts in the Office of Program Assistance and Review monitor executive branch agency ethics programs and employee compliance with applicable ethics laws

and regulations through periodic ethics program reviews. Ethics specialists, who serve as desk officers, assist agencies in the development, maintenance, and improvement of agency ethics programs. Desk officers often assist agencies in implementing ethics program recommendations stemming from reviews conducted by the management analysts. The Office of Education assists departments and agencies in insuring that quality ethics education programs are provided to the almost five million executive branch employees and that materials are made available to facilitate these programs.

Throughout the executive branch there is a network of Designated Agency Ethics Officials (DAEOs), one in every executive department and agency. These individuals and their staffs make up the "Federal ethics community" to which OGE communicates policy and regulatory changes. These men and women are employees of the agencies and they conduct the Federal ethics program on site: giving advice and guidance on matters of conflict of interest, financial disclosure, standards of ethical conduct and post-employment restrictions; educating employees about the statutes and standards; assisting in individual employee disciplinary actions and implementing their agencies' public and confidential financial disclosure systems.

A Presidential transition year presents special responsibilities for the Office of Government Ethics. Prior to an election, OGE briefs candidates' staffs on the ethics laws covering high-level appointees and how OGE works with new appointees and the White House Presidential Personnel Office in the appointment process. More particularly, the financial disclosure statements of individuals nominated by the President for positions requiring confirmation by the Senate are reviewed by the White House Counsel's Office, agencies and OGE prior to the nominees' confirmation hearings. Prior to their confirmation hearings in the Senate, the personal finances of individuals nominated are thoroughly analyzed, problem areas are discussed with them, and appropriate remedial steps are fashioned, or agreed to, in order to avoid conflicts between the nominees' financial interests or affiliations and their prospective Government positions.

Accomplishments

The achievements of the Office of Government Ethics since the last reauthorization are significant.

The agency became separate in October 1, 1989 which required OGE to take responsibility for creating and providing the services which it had previously received from the Office of Personnel Management: financial and recordkeeping activities, personnel services, information management, drafting and issuing regulations governing agency activities.

In 1989, during the months immediately preceding OGE's becoming a separate agency, a Presidential election and transition began. President Bush signed Executive Order 12674 directing OGE to issue new branch-wide standards of conduct replacing agency specific stnadards in use since the mid-1960s. In addition, later in the year the Ethics Reform Act was passed and technical amendments were passed the following May. Provisions of this Act necessitated changes to all the forms which had been issued by OGE and also required issuance of new regulations implementing changes to the criminal conflict of interest statutes and newly-enacted civil "ethics" statutes. A list of the major tasks facing OGE follows:

- issuing new administrative standards of ethical conduct;
- issuing new regulations and forms implementing public and confidential financial disclosure systems;
- issuing new post-employment regulations and guidance;
- developing procedural guidance for agency ethics programs and OGE oversight;
- issuing regulations on agency ethics training programs;
- developing and administering a Certificate of Divestiture program for the deferral of recognition of capital gains for assets sold to avoid actual or potential conflicts of interest;
- drafting for the FAR Council the federal acquisition regulations' provisions pertaining to post-employment restrictions; negotiating for employment and gifts applicable to procurement personnel; and
- drafting and issuing interpretive regulations on the criminal conflict of interest statutes.

We have accomplished every item on this list except the issuance of interpretive regulations for the criminal conflict statutes. Those three regulations are in varying stages of the drafting process. We hope the Section 208 regulations will be published this fiscal year followed by the Section 207 and finally the Section 209 regulations.

At an OGE oversight hearing in 1990, Senator Levin, you, as the Chairman of the Subcommittee on Oversight of Government Management, Senate Committee on Governmental Affairs, urged OGE to be more assertive in gaining compliance from agencies on recommendations made in our program reviews. The lack of necessary personnel to conduct the reviews was noted in a General Accounting Office review of OGE's agency oversight role. With the support of

the Administration and the Congress, OGE received the financial and personnel resources necessary. Resource increases were primarily applied to strengthening the program review function and the agency desk officer system.

During 1992 and 1993, OGE issued 80 reports to Designated Agency Ethics Officials making recommendations to strengthen ethics programs. Copies of these reports also were sent to agency heads. These reports covered ethics programs in 104 departments, agencies, offices or components and 27 regional offices and military bases. This compares to 17 reports issued during the 1990-1991 period. OGE also increased follow-up reviews six months after each report to ensure that agencies implemented report recommendations.

The Office of Education began to develop strategies to assist agencies in implementing ethics training including developing training materials, pamphlets and videotapes for individual agency use. It also coordinated the development of agency annual training plans to ensure that all employees are aware of their responsibilities under the various statutes and regulations which pertain to ethical behavior.

In 1991 the Office of Government Ethics hosted a conference for 200 executive branch agency ethics program staff at Virginia Beach. This was the first such meeting since 1982 and it was very well received. It brought ethics officials together to discuss common problems and concerns and to share solutions among agencies. It was also an opportunity for OGE to communicate directly with the ethics community. OGE also held conferences in 1992 and in 1993. Four hundred ethics officials attended the most recent conference, doubling the size of the two previous meetings.

At the end of 1993, OGE again geared up for a Presidential transition. This time, however, the process required more resources than in the past. Not only did the new incoming Administration need assistance with the nominee financial disclosure and conflict of interest review process, but because this transition involved a change of political party, there was a substantial increase in the need for information on negotiating for employment and for guidance on post-employment rules for the members of the previous Administration.

Resources

Since its inception the Office of Government Ethics has been small by any standards. Its programs have been necessarily focused and leanly staffed. At the present time the Office of Government Ethics has an appropriation of $8.3 million dollars for FY 94 and is allocated a personnel ceiling of 93. The request in the President's budget for OGE for FY 95 is for $8.1 million dollars and a personnel ceiling of 93.

Reauthorization of OGE

We are here today to present the Administration's request for reauthorization of the Office of Government Ethics for a period of eight years and to provide for gift acceptance authority for the Office.

The first reauthorization for OGE occurred in 1983 and was for a period of five years. In 1988, the authority necessary for OGE to become a separate agency in 1989 was part of a legislative package in which OGE was reauthorized for six years through Fiscal Year 1994. The purpose for this term was to avoid having a reauthorization fall within an election season, or during the first year of a Presidential term when substantial resources of OGE are devoted to the nominee clearance process.

The bill S. 1413 provides for reauthorization of OGE for a period of eight years, through Fiscal Year 2002. This eight year period continues the avoidance of both a Presidential election year and the first year of a Presidential term. An additional benefit of this period of time is the savings of staff time and resources that would be expended for reauthorization hearings and legislation for a shorter period of time.

An additional provision of the legislation is the authorization of gift acceptance authority for the Office of Government Ethics, within certain restrictions and requirements. The Director may accept, on behalf of the United States, contributions of money, use of facilities, personal property and services to further the mission and programs of OGE.

This proposed gift acceptance authority would be used primarily to support OGE's education and training program. In carrying out its training mission, OGE provides ethics training at locations both in Washington, DC and throughout the United States. Government facilities are sometimes not adequate in terms of size or equipment resources to support our multi-agency training efforts. In some cases, private or state or local government facilities may be better suited to our training needs. This gift acceptance authority would enable OGE to accept the use of these facilities and the services of technical and other personnel, such a projectionists and custodians, if offered by someone other than another Federal agency. Equipment and material could be accepted under this authority. Language in the bill precludes acceptance of any gift that would attach conditions inconsistent with law or regulation or would require the expenditure of funds not available to OGE. In addition, the Director of OGE is required to promulgate rules establishing criteria governing gift acceptance to assure that any gift will not compromise the integrity of the Agency's programs or create unfavorable appearances.

This concludes my statement. I will be happy to respond to any questions you may have about the Office of Government Ethics, about our programs or about the legislation reauthorizing the Office.

United States
Office of Government Ethics
1201 New York Avenue, NW., Suite 500
Washington, DC 20005-3917

March 14, 1994

The Honorable Carl Levin
Chairman
Subcommittee on Oversight of Government Management
Committee on Governmental Affairs
United States Senate
Washington, DC 20510-6250

Dear Mr. Chairman:

This is in response to your letter of January 28, 1994, in which you and Senator Cohen sought information about various activities and programs of this Office in anticipation of a hearing on S. 1413, a bill to reauthorize the Office of Government Ethics beyond its current expiration date of October 1, 1994. Included in this letter are our answers to most of the questions you posed. Our answers to those questions that requested our views on possible legislation, primarily questions 8 and 12, require coordination through OMB, and we will provide those separately. We did not want to delay providing you with most of the information you requested.

We are providing our answers as an enclosure to this letter. We have restated each question posed and followed that with our answers. If you have any additional questions, please do not hesitate to contact me.

Sincerely,

Stephen D. Potts
Director

Enclosures

Enclosure to letters to Senators Levin and Cohen dated 3/11/94

1. What were OGE's budget and staff levels for each fiscal year from 1989 through 1994? What are the projected budget and staff levels for fiscal year 1995?

FY YEAR	FUNDING	AUTHORIZED STAFF LEVELS*
1989	$1,822,000	35
1990	$3,414,000	53
1991	$3,500,000	53
1992	$6,303,000	70
1993	$8,265,000	101
1994	$8,313,000	93
	- - - - -	
1995	$8,154,000	93

*The actual number of staff years used has been less than the authorized level each year.

a. What budget and staff levels did the Director of OGE request for each of the fiscal years 1989 through 1994?

With the exception of FY 1993, the levels noted in the previous answer are also those requested in the President's budget for each of those fiscal years. In FY 1993, the President's budget requested $8,365,000 which Congress reduced by $100,000.

b. Has OGE been able to adequately meet its statutory responsibilities within its budget and staff levels? What areas, if any, have been negatively affected by these levels?

The resources requested in 1989 did not anticipate the added workload incident to the issuance of Executive Order 12674 and the passage of the Ethics Reform Act. We also were limited in our request for 1990 and 1991 by a statutory ceiling. The Administration and Congress supported our request for a change in the ceiling, and for the fiscal years since the Office of Government Ethics has consistently continued to meet its statutory responsibilities with the resources provided through the appropriations process. We are not aware of any present negative impact as a result of a lack of funding or staffing.

2. **Please provide the following data for each year from 1989 through 1993:**

-- **the number of agency compliance reviews conducted and audit reports issued by OGE;**

Each program review conducted by OGE at an agency headquarters results in a report to the DAEO with a copy to the agency head. The results of regional reviews are incorporated into the headquarters' reports to the DAEOs. The number and type of reviews conducted in each year from 1989 through 1993 are as follows:

YEAR	AGENCY REVIEWS/REPORTS	REGIONAL REVIEWS
1989	12	4
1990	10	6
1991	7	4
1992	41	17
1993	39	10

-- **the average interval between OGE audits of an agency, and OGE's target interval;**

It is difficult to determine average intervals. Prior to the increase in resources beginning in FY 1992 when OGE had few staff to devote to program reviews, we tried to ensure that at least some components of major departments were reviewed at least every three to four years. While this meant we had a presence in a department at least every four years, an individual agency within that department might only be reviewed once every ten years. However, it was our belief that if we reviewed some systems or components within a department, prudent ethics officials there would apply the recommendations throughout the department especially where they knew similar problems existed.

With regard to reviews of separate agencies, as opposed to departments or agencies within departments, OGE conducted reviews of most at least once during the period between 1981 through 1991. Certain of the larger agencies, especially those which had programs receiving critical public attention were reviewed more often. For example, the Environmental Protection Agency was reviewed in 1982, 1985, 1989 and 1993. NASA was reviewed in 1983 and 1988. FEMA was reviewed in 1982, 1985, 1987 and 1990. We attempted to focus our limited number of staff resources on those agencies which seemed to be experiencing problems.

With the Program Review Division's current staffing, we hope to review each independent agency at least once every four years. We also are trying to ensure that all agencies within major departments are reviewed at least once every four years. While we will review components of the Department of Defense every four years (Departments of the Army, Navy, and Air Force and the Defense

agencies), we will only be able to review individual military commands as time and travel funds permit.

This interval of four years exceeds the target cycle of three years we set in 1981. However, because of other services now being provided by OGE, we believe this review schedule is appropriate. Through the desk officer system established in 1990, we have found that we can become more quickly aware of agencies with problems in their ethics programs than through reviews only. If these problems cannot be solved through the assigned desk officer's intervention, we schedule a program review. Also, our staffing levels now permit us to perform a six-month follow-up review after each agency review to ensure that our recommendations have been implemented.

-- **the number of instances in which OGE recommended that an agency head take corrective action, the number of corrective actions taken, and what those corrective actions were;**

Since 1989, OGE has issued one corrective action order to an agency because of its ethics program. That order was sent to the Administrator of the Agency for International Development (AID).

In August 1991, OGE sent a program review team to AID which found immediately that the public financial disclosure forms (SF 278) filed in May 1991 had not been reviewed or certified by the agency. Rather than proceed, the team withdrew and on October 9, 1991, OGE issued a Notice of Deficiency to the DAEO ordering him to review and certify within 60 days approximately 350 public financial disclosure reports filed in 1991. After the 60-day period, a further review by OGE found that the Notice of Deficiency had not been complied with and, in fact, more than 700 other public financial disclosure reports for the years 1986 through 1990 had not been certified.

As a result the Director of OGE, on September 15, 1992, ordered the Administrator of AID to ensure that all public financial disclosure reports due in 1991 and 1992 were reviewed for correct completion and conflicts of interest and certified within 60 days of the order. In addition, the Director ordered that the public financial disclosure reports not certified for the period 1986 through 1990 be reviewed for conflicts of interest and certified within six months from the date of the order. OGE asked the Administrator to report back within 60 days of AID's actions on these matters. The order was set forth in OGE's letter transmitting the program review report containing other recommendations to the new DAEO for AID.

Following the receipt of this report the AID Administrator met with the Director to assure him that the order would be carried out within the time frames set and that AID had started a major effort to improve its ethics program.

As a result of subsequent meetings with AID officials, in letters from AID, and in a follow-up review, OGE determined that AID had substantially carried out the order. On August 9, 1993, the Director of OGE sent a letter to the new AID Administrator formally lifting the corrective action order.

-- **the number of advisory opinions issued (formal and informal);**

OGE has issued no formal advisory opinions during the period about which you asked. It has, however, continued to respond by letter to written requests for advice and guidance and to issue Memoranda to ethics officials and to General Counsels and/or Inspectors General (DAEOgrams). In order to provide those interested in our analyses of various issues, we have since 1979 reviewed those letters and DAEOgrams, selected those which addressed issues of general interest and, with regard to the letters, which restated enough facts so as to be useful to a reader without the backup material. We then deleted any personal identifying information substituting generic descriptions. They have then been made public. These informal letters and memoranda (sometimes referred to as informal opinions although they have not been issued under any formal or informal procedures) have been numbered indexed, and made available to the public in our library and more recently through our electronic bulletin board (TEBBS). In addition the formal opinions and informal letters and memoranda for 1979-1990 have been published by and sold through the GPO. The 1991 and 1992 letters and memoranda have been sent to GPO for publication and should be available by the end of March or early April. The numbers of excised letters and memoranda published for 1989-1992 are as follows:

1989	20
1990	28
1991	37
1992	28

OGE is still in the process of selecting the 1993 letters and memoranda for publication. For 1993, we have tentatively selected 41 letters and memoranda although because of the number of similar letters about the new confidential financial disclosure form, we may try to combine some of the more unique questions into one published letter format. As a general statement, eliminating those letters which transmit SF 278s to the Congress or which deal with general administrative matters, we are probably able to publish in a stand-alone useful format about one-third of the letters which discuss in some manner the statutes and standards interpreted by OGE.

-- **the number of training courses conducted, including the approximate number of Federal employees in attendance;**

OGE conducts training courses primarily for ethics officials. However, in 1993, through an agreement with the Small Agency Council, we began conducting annual ethics training for certain employees in agencies with 100 or fewer employees. The following table shows that combined data by calendar year.

	1989	1990	1991	1992	1993
Number of training courses	19	25	30	32	55
Number of Federal employees attending	576	688	1,062	1,625	1,585

OGE staff also make presentations at Government and private sector seminars and conferences. The table below shows an estimate of the number of those types of presentations and the approximate number of attendees by calendar year.

	1989	1990	1991	1992	1993
Number of events	88	74	62	74	64
Number of attendees	4,700	7,700	8,275	7,450	4,700

-- **the number of waivers pursuant to 18 U.S.C. 208 that were granted by agencies, after consultation with OGE;**

Executive Order 12674, as modified, requires agencies to consult with OGE on the issuance of waivers under 18 U.S.C. 208(b)(1), where practicable. This consultation, when it takes place, may involve the discussion of draft language or may occur in a telephone call. Therefore, we do not have any accurate measurement of waivers issued after OGE consultation. What we do have, however, are copies of waivers sent to us by agencies pursuant to Section 301(d) of that Order. The following table shows the numbers of copies of waivers received, not those on which we have been consulted or those reported by agencies on the annual questionnaire as having been issued.

Waiver Type	1989	1990	1991	1992	1993
(b)(1)	14	25	123	646	409
(b)(3)	1	25	37	460	365

-- **the number of cases OGE asked Inspectors General to investigate and the results of such requests; and**

When OGE receives an allegation that an employee of an agency has violated some conflict of interest statute or standard of conduct, we normally refer that first to the DAEO so that he or she is aware of the allegation. The DAEO then refers the matter to the IG. OGE occasionally receives allegations of misconduct not involving ethics standards and statutes. We send these to the appropriate IG directly but we keep no statistics regarding these referrals.

-- **the number of referrals of possible ethics violations OGE made to the Department of Justice, and the number of prosecutions and declinations that resulted.**

Other than complaints about DOJ employees which were sent to the Department as the employing agency, OGE did not make any direct referrals to the Department of Justice of possible ethics violations of statutes during this period. The referrals to DOJ went directly from the employing agencies as the primary investigator. In many instances OGE has been consulted by the employing agencies prior to the referrals. This process is consistent with our view as OGE as the consultant and the agency as the primary actor.

3. Please identify all regulations OGE has promulgated in draft, interim, or final form since its last reauthorization. Please identify the most significant regulatory actions OGE plans to take during the next year. In particular, please identify the status of OGE's efforts with respect to the standards of conduct governing participation in professional associations, 5 C.F.R. 2635.806.

The 67 Federal Register issuances (including notices as well as proposed, interim and final rules) which OGE has issued since its last reauthorization in November 1988 are shown in the appended list. Much of this regulatory action was necessitated by the 1988 reauthorization act (including separate agency status) and the Ethics Reform Act of 1989, as amended. In addition, OGE action has been prompted by the Presidential mandates contained in Executive Order 12674, as modified by E.O. 12731, setting forth renewed principles of ethical conduct and other ethics matters and Executive Order 12834 concerning ethics pledges for certain high-level appointees.

The Office has also revised/issued, (where appropriate) secured OMB and/or GSA approval for and disseminated the following external-use ethics forms:

- A revised January 1991 edition of the Standard Form (SF) 278 Executive Branch Personnel Public Financial Disclosure Report.

- A new SF 450 Executive Branch Personnel Confidential Financial Disclosure Report (July 1992 edition).

- New OGE Forms 203 & 204 -- senior appointee and trade negotiator ethics pledges (January 1993).

- Two revised editions of the OGE Form 201, now entitled "Request to Inspect or Receive Copies of SF Executive Branch Personnel Public Financial Disclosure Report or Other Covered Record" (February 1990 and July 1993).

- An OGE Form 202 "Notice of Conflict of Interest Referral" (January 1992)

OGE continues to work on several additional ethics regulations to be issued in the future. The most significant are:

- Liberalizing amendments to the ethics training regulation (subpart G of part 2638).

- A new interim post-employment restrictions' regulation (part 2641).

- An interpretive and waiver regulation under 18 U.S.C. § 208

- An interpretive regulation under 18 U.S.C. § 209.

In addition, OGE continues to work with several dozen agencies which are in the process of issuing, with OGE concurrence, supplemental standards of conduct and financial disclosure regulations for their respective employees. Eight supplemental regulations were issued last year. See the attached list of the new 5 C.F.R. chapter and part number assignments for agencies' supplemental regulations secured by OGE from the Federal Register Office. Moreover, OGE recently published an additional one-year grace period extension for 52 agencies' existing conduct standards dealing with prohibited financial interests and prior approval for outside employment and activities. See 59 FR 4779-4780 (2/2/94).

Finally, OGE is doing the following work on forms:

- Ongoing revisions to the SF 278 Public Financial Disclosure Report to include the higher thresholds for reporting of tangible gifts ($250 aggregate/$100 exclusion) and to make certain other minor improvements in the form. OMB clearance has already been obtained for the new version of the form, and GSA review is pending.

The revised SF 278 should be ready for agency use around late spring/summer 1994. (The current 1/91 edition of the SF 278 will remain usable, with notice of the higher gifts reporting thresholds.)

- A revised version of the SF 450 Confidential Financial Disclosure Report will start later this year.

- A possible revision of the Conflict Referral Form 202.

OGE reserved a section entitled "Participation in professional associations" in the final standards of conduct at 5 C.F.R. 2635.806. It was our purpose to preserve the status quo in terms of what is permissible under agency regulations and policies implementing Office of Personnel Management guidance on excused absence and participation in professional association activities. Agencies were advised as well to continue providing guidance to officers of professional associations regarding the applicability of 18 U.S.C. § 208 and to the officers and active members about the representational restrictions in 18 U.S.C. §§ 203 and 205. Given the application of these authorities, the Office has concentrated its efforts on reviewing supplementals and has deferred any possible rulemaking until the summer of 1995. In the meantime, OGE will continue to reassess its experience under the overall standards and may decide simply not to issue any specific standards on professional associations. If OGE does so decide in the future, the concerned community including agency ethics officials will be promptly notified.

4. Please summarize OGE's efforts in connection with the recent Presidential transition, including data on the number of nominees reviewed by OGE and the average length of time required for OGE clearance. Having recently handled a Presidential transition, are there any legislative or administrative changes that OGE would recommend to facilitate future transitions?

As a Presidential election draws near, OGE offers to brief individuals representing both candidates regarding the public financial disclosure procedures of the Presidential appointment process. In 1992, our offer was accepted by the Clinton Transition Foundation and we provided such a briefing. After the election we provided advice as requested to both the Bush Administration and then President-elect Clinton's transition group with regard to concerns about the provision and use of nonpublic information to and by transition teams as well as conduct issues arising from the use of non-Government employees on transition teams. We made our conflict of interest counseling services readily available to those who were considering others for positions within the Clinton Administration (and those who were thinking of seeking such positions). We also provided increased assistance to individuals and agency ethics officials on the subjects of seeking private

employment and post employment restrictions for those who were leaving Government service.

Presidential nominee public financial disclosure report certification data for the entire five-year period is as follows:

Nominee SF 278 reports certified in 1989: 463

Nominee SF 278 reports certified in 1990: 306

Nominee SF 278 reports certified in 1991: 328

Nominee SF 278 reports certified in 1992: 256

Nominee SF 278 reports certified in 1993: 547

In addition to those figures shown above, every year there are either draft or final SF 278 reports received and reviewed by OGE but which are not certified and transmitted to the Senate. This occurs when a nomination initially considered is not formally made or because individuals withdraw their names from consideration. Those numbers for the same period are as follows: 1989: 22; 1990: 33; 1991: 29; 1992: 33; 1993: 32 (as of March 10, 1994.)

There is no calculable average length of time for OGE clearance of a nominee SF 278, because the length of time for the processing of each report varies, depending upon action by the White House. Ideally, our Office is given a draft copy of a potential nominee's SF 278 while the individual is going through an extensive background clearance process. This allows time for an assigned OGE reviewer to examine the report and to discuss with the agency ethics official and with an attorney in the White House Counsel's Office any potential conflicts of interest, conflicts' resolutions, incorrect completion of the form and required amendments.

After the nomination is actually forwarded to the Senate and once OGE has received the final completed SF 278 and opinion letter from the agency in which the individual is to serve, OGE sends the form and its opinion to the appropriate confirming committee as quickly as possible.

From our program perspective alone, we do not at this time believe there are any administrative changes that would facilitate future transitions.

5. Current law requires that anyone who wishes to see a public financial disclosure form fill out an application listing his or her name, occupation, and address. Those applications are available to the disclosing official. The Subcommittee has received reports that this requirement may chill public access to

financial disclosure reports. Would OGE support repealing or modifying the requirement that requesters disclose their identity?

Without taking any position on a legislative change of this nature in this letter, OGE has not experienced any problems with the requirement that those who seek access to SF 278 Public Financial Disclosure Reports of high-level executive branch officials disclose their identities. This information, along with a list of prohibited uses of such SF 278 reports (they may not be used for any commercial purpose, other than dissemination by the news media to the general public, for charitable solicitation, for unlawful purpose, etc.), is provided on OGE Form 201 (copy appended). The requester's identity provides a record that can assist in enforcing such prohibited uses in the event that there might be any violation thereof. Further, the identifying information assists in notifying the requester when SF 278s or other covered records requested are ready for inspection or review. (In the case of transmittal by mail, this information is especially important). It also seems a reasonable requirement given the sensitive, though publicly available, financial information being sought. An access form is not provided by OGE to the filer or anyone else except upon request. Except for ethics and other authorized officials, any person wanting to find out who had requested a specific individual's form would have to fill out another access form.

Some agencies may administratively notify filers when their own forms are requested. OGE's executive branch-wide regulation does not require such notice. To the best of OGE's knowledge, such agency practice has likewise not resulted in any chilling of requests. We are not aware of any instances in the executive branch where there has been a claim of unfair actions by a Government official towards an individual because that person requested a copy of the official's financial disclosure report.

6. How is the compartmentalization process under Section 207 working? Does it need modification? If so, please specify how.

Section 207(h) of title 18, United States Code, authorizes the Director of OGE to designate separate departmental and agency components for purposes of 18 U.S.C. § 207(c), the one-year post-employment restriction applicable to former "senior" employees. Section 207(c) prohibits a former senior employee from making, with the intent to influence, a communication to or appearance before his former department or agency in connection with a matter concerning which he seeks official action on behalf of another person. The designation of a component or components of a department or agency has the effect of narrowing the scope of section 207(c) in the case of those former senior employees eligible to benefit from such designations. The designations do not affect the scope of the five other substantive restrictions of

18 U.S.C. § 207 applicable to former employees of the executive branch.

When OGE designated departmental and agency components for purposes of the post-Ethics Reform Act of 1989 version of 18 U.S.C. § 207, we initially adopted the same regulatory component designations that had been in effect under the prior version of the statute. Since initial publication of 5 C.F.R. part 2641, we have amended the list of components in appendix B three times. Although according substantial weight to the views of the requesting designated agency ethics official, OGE has declined at least one department's request for designation of a particular component. On the other hand, OGE has designated several component agencies and bureaus at the request of the Department of the Interior given that department's division into distinct functional areas. Despite its size, however, OGE has never considered the division of the Department of Agriculture into components since that department has never submitted a request for our consideration.

We have received little feedback concerning the statutory component designation authority or OGE's regulatory implementation of that authority. Of the handful of written comments submitted to OGE in response to the publication of 5 C.F.R. part 2641, none included any significant criticism of our implementation of 18 U.S.C. § 207(h). In addition, the annual agency "updates" of current designations submitted to OGE since 1991 have contained no significant comments relating to the regulatory implementation of that section. While the interpretation of section 207(h) and part 2641 can be difficult in a given case, we have insufficient information to persuade us that any modification is warranted at this time.

7. Are the blind trust provisions being used adequately? If not, why not?

In recent years, many appointees have seen the new Excepted Investment Fund disclosure rules (Ethics Act, § 102(f)(8)) and Certificate of Divestiture procedure (IRC, § 1043) as alternatives to situations when they would otherwise consider the establishment of a blind trust arrangement. The expense and complexity of blind trust arrangements, and the sizable estate required to make their use worthwhile, have traditionally been impediments to their use. As a consequence, the actual proportion of executive branch personnel who have blind trusts is small. We feel, however, that the present balance of the legislative scheme between public policy concerns and the practicality of the scheme for officials who use it is appropriate.

8. As you know, a special committee of the ABA issued a report calling for reforms in Federal ethics law. Please state whether OGE would support the following legislative changes, and why or why not:

-- **Amending Section 207(a) to prohibit "aiding or advising," as well as contacts with one's former agency;**

-- **Abolishing Section 209 and relying instead on the bribery and illegal gratuities laws;**

-- **Cutting back on the number of officials required to file public financial disclosure; and**

-- **Making additional changes to tax law to minimize the adverse tax consequences for nominees who divest certain assets.**

Because the answers to these questions would require a position on possible legislation, they will be provided under separate cover.

9. Does OGE maintain the following statistics on ethics actions that originate from agency ethics offices:

-- **the number of allegations of violations of conflict-of-interest statutes that are received in those offices;**

OGE does not maintain statistics on the number of allegations of violations of conflict-of-interest statutes that are received in agency ethics offices.

-- **the number of those allegations that are referred to the Department of Justice from the agencies; and**

From the Annual Agency Ethics Program Questionnaire (annual questionnaire) completed and submitted to OGE, agencies have reported the following information with regard to referrals:

Criminal Conflict of Interest Matters
Referred to the Department of Justice

1989	1990	1991	1992	1993*
106**	122	134	148	

* Statistics from the 1993 annual questionnaire are currently being received and entered into OGE's database. Therefore, a summary report is not yet available.

** This number may include some civil statute referrals as the annual questionnaire for 1989 did not ask agencies to separate that information.

-- **the number of waivers granted, divestitures ordered, or administrative remedies obtained by agency heads or ethics officials**

Through the annual questionnaire, agencies have reported the following information on the number of waivers granted, divestitures ordered, or administrative remedies obtained by agency heads or ethics officials. The annual questionnaire requests that information for two separate groups: non-PAS, full-time public financial disclosure filers and non-PAS, full-time confidential financial disclosure filers.

Actions of Non-PAS Full-Time Public Financial Disclosure Filers

TYPE OF ACTION	1989	1990	1991	1992	1993 *	TOTALS
Divestiture	80	90	114	92		376
Resignation	54	70	25	59		208
Written disqualification	412	618	697	900		2,627
18 U.S.C. § 208(b)(1) waiver	95	72	65	69		301
Reassignment	4	6	14	2		26
Other	846	596	939	92		2,473
Totals	1,491	1,452	1,854	1,214		6,011

* Statistics from the 1993 annual questionnaire are currently being received and entered into OGE's database. Therefore, a summary report is not yet available.

Actions of Non-PAS Full-Time Confidential Financial Disclosure Filers

TYPE OF ACTION	1989	1990	1991	1992	1993 *	TOTALS
Divestiture	204	315	416	347		1,282
Resignation	38	20	119	48		225
Written disqualification	3,797	6,370	9,038	9,285		28,490
18 U.S.C. § 208(b)(1) waiver	251	302	376	362		1,291
Reassignment	72	80	164	70		386
Other	1,752	1,859	3,720	270		7,601
Totals	6,114	8,946	13,833	10,382		39,275

* Statistics from the 1993 annual questionnaire are currently being received and entered into OGE's database. Therefore, a summary report is not yet available.

The annual questionnaire requests information about waivers issued to Special Government Employees (SGE's) but does not request the other types of information shown above. Waiver information reported by agencies for SGE's is as follows:

Special Government Employees

WAIVER TYPE	1989	1990	1991	1992	1993 *	TOTALS
18 U.S.C. § 208 (b)(1)	326	39	244	141		750
18 U.S.C. § 208(b)(3)	**	96	38	520		654
TOTALS	326	135	282	661		1,404

* Statistics from the 1993 annual questionnaire are currently being received and entered into OGE's database. Therefore, a summary report is not yet available.

** Subsection (b)(3) authority only became available upon passage of the Ethics Reform Act in 1989.

What procedures, if any, exist for agency ethics officials to notify you of such actions?

As noted, the information provided above is from the answers agencies have submitted each year on the annual questionnaire. In addition to that questionnaire, there are other statutory and regulatory requirements imposed upon agencies requiring reports of similar information.

- Notifications of Ethics Agreements which Presidential Appointees Have Made. Pursuant to 5 C.F.R. § 2634.803 agencies are required to notify OGE of ethics agreements which Presidential appointees have made in conjunction with their nominations or after their appointments. An ethics agreement describes the actions which the Presidential nominee/appointee has agreed to take to resolve potential or actual conflicts of interest including divestitures, resignations from outside positions, written disqualifications, waivers, and other types of actions. In addition to the notification requirement, agencies must forward evidence of compliance with ethics agreements to the Director of OGE. A DAEO who is not an advice and consent appointee is also required to apprise OGE of any personal ethics agreements. Information regarding the number of individuals and the types of actions involved in those agreements follows.

PAS Ethics Agreements

	1989	1990	1991	1992	1993
NUMBER OF PERSONS	271	107	108	73	288
TYPES OF AGREEMENTS					
Severance Payment	57	18	14	8	26
Blind Trust	11	2	2	2	8
Recusal	192	65	74	52	174
Waiver	36	16	21	19	61
Divestiture	86	37	22	21	123
Resignation	161	65	42	30	198

- Criminal Referrals. Under 5 U.S.C. app. § 402(e)(2) each agency is required to inform the Director upon referral of any alleged violation of the criminal conflict of interest statutes to the Attorney General, if the notification is not otherwise prohibited by law. In order to meet this statutory requirement we may provide a copy of the referral document or submit OGE Form 202, a referral form developed as a result of consultations between OGE, DOJ, and agency Inspectors General.

- Waivers. A combination of formal and informal procedures exist for agencies to notify OGE of waivers. According to Executive Order 12674, as modified, agencies are, where practicable, to consult formally or informally with OGE prior to granting any waiver. Agencies consult informally with OGE via the telephone and, in certain circumstances, may submit draft waivers to OGE prior to issuing them to employees. Agencies are required by that order to submit copies of all waivers to OGE after issuance. The number of copies we have received was noted in an earlier answer.

  NOTE: As you can see the number of referrals and waivers noted by agencies in the annual questionnaire and the actual number of notifications of referrals and copies of waivers we have received do not match. These inconsistencies are to be noted and examined by the program review staff when conducting an agency ethics program review. In addition, however, the questions about referrals on the annual questionnaire elicits different information than the notification form because the information is used for different purposes. Therefore, a discrepancy may very easily occur, even if we receive all notifications required.

10. What kind of ethics training do new Federal employees receive from their agencies, and what is OGE's role in that training? What kind of continuing ethics training do Federal employees receive, and what is OGE's role? What kind of counseling do Federal employees receive with respect to post-employment restrictions when they leave Government service?

New Federal employees are required to receive an initial ethics orientation within 90 days of their entrance on duty in accordance with 5 C.F.R. part 2638 Subpart G. This orientation must consist of a minimum of one hour of official duty time to review 5 C.F.R. part 2635, the Standards of Ethical Conduct for Employees of the Executive Branch (Standards). Agencies may provide employees summaries of the Standards in lieu of the actual text. However, should agencies use this option, copies of the complete text of the Standards must be retained and readily accessible in the employees' immediate office areas. Additionally,

agencies are required to provide employees with the names, titles, office addresses and telephone numbers of their designated agency ethics officials and other agency ethics officials available to answer questions regarding the employees' ethical responsibilities.

As with the initial ethics orientation requirements, OGE's training regulation specifies minimum requirements for the annual ethics training. Certain Federal employees are to receive ethics training on an annual basis. These "covered" employees are identified in Executive Order 12674, as modified, and consist of executive branch agency employees who are:

- appointed by the President,
- employed within the Executive Office of the President,
- required to file public or confidential financial disclosure reports,
- contracting officers,
- procurement officials, or
- designated by the head of the agency or his or her designee based on a determination that such training is desirable in view of their particular official duties.

Covered employees are required to receive a minimum of one hour of verbal annual ethics training. This training shall include, at a minimum, a review of employees' responsibilities under:

- part I of Executive Order 12674,
- any supplemental agency regulations, and
- the conflict of interest statutes.

Generally, agencies are responsible for conducting both their initial ethics orientations and annual ethics training. OGE monitors agency compliance with the annual ethics training requirements through its annual questionnaire and through on-site performance reviews conducted by its Program Review Division. This includes attending any agency annual ethics training being offered during the review.

OGE does, however, conduct one hour annual ethics training for covered employees of executive branch micro agencies (agencies with 100 employees or less). This is done under an agreement with the Small Agency Council. OGE conducted 10 sessions in 1993, training approximately 290 Federal employees. We will conduct a total of eight sessions in calendar year 1994, two of which have already been completed.

In addition to training ethics officials in the substance of the statutes and regulations, OGE plays a supporting role in the education and training of executive branch employees by providing services and materials to agency ethics officials. OGE provides a

course entitled *Presentation Skills for Ethics Trainers* to assist agencies in conducting effective ethics training. OGE developed two videotapes and two pamphlets as well as a large print version of the standards of conduct for use by agencies in their training programs. More videos are in the process of being developed and at least one more pamphlet that can be provided by agencies to employees is being finalized. OGE is also in the process of establishing an Ethics Information Center which will serve as a repository for ethics training materials which have been developed by OGE and other agencies. These materials will be made available to agency ethics trainers to provide them with substantive ideas for the content of annual ethics training sessions, as well as ideas for different presentation methods.

Finally, the type and amount of counseling on post-employment vary among the agencies. Some agencies conduct routine exit briefings with certain high-level officials; others include a post-employment summary as a standard part of an exit package for all employees. According to the 1992 annual questionnaire, post-employment is the fourth most frequent type of advice rendered by agency ethics officials.

11. Are there DAEOs in place in every agency? Has OGE's relationship with DAEOs changed since the last reauthorization and, if so, how? Does OGE have any suggestions for reform of the DAEO system?

The position of DAEO is currently filled at every executive branch agency. (This is not to say that all short-term entities such as the Boards, Commissions or Committees created by Congress have DAEOs nor are we aware of their existence in many instances.) OGE annually collects information from each executive agency in accordance with section 402(e)(1) of the Ethics in Government Act of 1978, as amended. In the most recent completed annual questionnaire, for calendar year 1992[1], 118 of 122 agencies reported that they had a DAEO in place. Those four have since filled the position.

OGE's working relationship with DAEOs has improved considerably since the last reauthorization. This working relationship has been a major focus of OGE. We have attempted to strengthen the sense of community and shared mission with executive agency ethics officials. Our primary method of accomplishing this has been through increased communications with agency ethics officials. In February 1990, OGE established a desk officer system

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[1] As of March 10, OGE has not received the annual agency ethics questionnaire for calendar year 1993 from 18 agencies. This was due to OGE by February 1, 1994. Because the 1993 data is incomplete, we are using the 1992 data to respond to this inquiry.

for executive branch agencies. These desk officers are now organized in OGE's Program Assistance Division within the Office of Program Assistance and Review. The desk officer system provides each agency with a point of contact at OGE. Having a specific OGE employee responsible for handling contacts from each agency gives OGE a greater understanding of that agency's mission and responsibilities. This knowledge allows OGE to increase its level of service to the agencies and understand more clearly the ethics concerns that may arise as a result of those responsibilities.

To further increase the sense of community among executive branch ethics officials, OGE in 1991 began again holding annual ethics conferences. These conferences have increased in size over the years; 194 ethics officials attended the 1991 conference, while the 1993 conference involved over 400 participants. Ethics officials from throughout the executive branch have been invaluable in planning and running these conferences. OGE has also been active in other, smaller scale projects to foster the growing sense of community among executive branch ethics officials. These include brown bag lunch meetings where the Director meets with a small number of DAEOs on an informal basis to discuss issues and their concerns about the program. The desk officers have also started a series of "coffee klatches" with the agencies they serve usually focusing on one topic.

All of these programs reflect what we believe is a successful attempt at a more effective working relationship between OGE and the DAEOs. The effectiveness of the executive branch ethics program will continue to increase as this working relationship continues to improve.

Finally, OGE has no suggestions to reform the DAEO system at this time.

12. Are there any other legislative changes or clarifications to any of the ethics laws which OGE believes need to be made?

A response to this question will be provided with the separate letter responding to all questions seeking views on legislation.

List of OGE Issuances in the Federal Register

This is a list of the issuances of the Office of Government Ethics (OGE) as published in the Federal Register since the 1988 OGE reauthorization and separation from OPM on October 1, 1989. Regulations wherein OGE just advised, such as the GSA § 1353 travel gifts interim rule, are not listed; rules in which OGE concurred, such as the procurement integrity and agency supplemental ethics regulations, are listed. In addition to these issuances, OGE publishes its own chapter of regulations each year in the CFR (5 CFR chapter XVI). An asterisk (*) denotes a major executive branch-wide issuance by OGE.

OGE ISSUANCE	FED. REG. CITATION	DATE PUBLISHED
1.*Paperwork notice/OGE Form 201 (access to SF 278s)	54 FR 48341	Nov. 22, 1989
2.*OGE separate 5 CFR chapter establishment & regs. transfer (new parts 2634, 2637 & 2638)	54 FR 50229-50231	Dec. 5, 1989
3.*Gifts standards extension rule (with OPM)	54 FR 53310-53311	Dec. 29, 1989
4.*Interim corrective action/agency reports reg. (new subparts D, E & F of part 2638)	55 FR 1665-1670	Jan. 18, 1990
5. Senior employees/agency components designations (part 2637 under old post-employment law)	55 FR 4308-4348	Feb. 7, 1990
6. Paperwork notice/SF 278 proposed 1990 revisions (later withdrawn)	55 FR 5664	Feb. 16, 1990
7.*Privacy Act systems notice (OGE/GOVT-1 & -2)	55 FR 6327-6331	Feb. 22, 1990
8.*Interim certificates of divestiture reg. (new subpart J of part 2634)	55 FR 14407-14409	Apr. 18, 1990
9. Semiannual OGE regulatory agenda	55 FR 16960-16963	Apr. 23, 1990

OGE ISSUANCE	FED. REG. CITATION	DATE PUBLISHED
10.*Final corrective action/agency reports reg. (subparts D, E & F of part 2638)	55 FR 21845-21847	May 30, 1990
11. Senior employees/agency components designations (part 2637 under old post-employment law)	55 FR 24855-24858	June 19, 1990
12. Parts 2637 & 2638 revisions/corrections	55 FR 27179-27180 & 27330	July 2, 1990
13. Part 2637 correction	55 FR 27933	July 6, 1990
14. OGE SES performance review board notice	55 FR 29927	July 23, 1990
15. Interim procurement integrity reg. (by FAR Council/OGE concurred)	55 FR 36782-36799	Sept. 6, 1990
16.*Proposed agency ethics training reg. (to be subpart G of part 2638)	55 FR 38335-38337	Sept. 18, 1990
17. Final OGE organization/functions rule (new part 2600)	55 FR 39589-39590	Sept. 28, 1990
18.*Paperwork notice/SF 278 revisions (1991 ed.)	55 FR 41621-41622	Oct. 12, 1990
19. Semiannual OGE regulatory agenda	55 FR 45280-45283	Oct. 29, 1990
20. Amended interim procurement integrity reg. (by FAR Council/OGE concurred)	55 FR 49852-49854	Nov. 30, 1990
21.*Interim honoraria/outside employment reg. (new part 2636)	56 FR 1721-1730	Jan. 17, 1991
22.*Interim post-employment reg. (new part 2641 under current law)	56 FR 3961-3965	Feb. 1, 1991

OGE ISSUANCE	FED. REG. CITATION	DATE PUBLISHED
23. Semiannual OGE regulatory agenda	56 FR 18132-18135	Apr. 22, 1991
24. § 2636.205 deferral/in lieu honoraria reports	56 FR 21589	May 10, 1991
25. Privacy Act Govt.-wide systems index (by OMB)	56 FR 28178-28181	June 19, 1991
26.*Proposed standards of ethical conduct (to be new part 2635)	56 FR 33778-33815	July 23, 1991
27. § 2636.205 deferral/in lieu honoraria reports	56 FR 51319	Oct. 11, 1991
28. Semiannual OGE regulatory agenda	56 FR 54166-54170	Oct. 21, 1991
29. Revised honorarium definition -- new exception (in part 2636)	57 FR 601-602	Jan. 8, 1992
30. Exemption/positions & agency comp. designations (part 2641 new post-employment reg.)	57 FR 3115-3117	Jan. 28, 1992
31. § 2636.205 deferral/in lieu honoraria reports	57 FR 5369	Feb. 14, 1992
32. New Treasury Dept. component designation (part 2641 new post-employment reg.)	57 FR 11673	Apr. 7, 1992
33.*Interim financial disclosure reg. (new part 2634 -- rev. public & new confidential reporting)	57 FR 11800-11830	Apr. 7, 1992
34.*Final agency ethics training reg. (subpart G of part 2638)	57 FR 11886-11891	Apr. 7, 1992
35.*Paperwork notice/new confidential financial disclosure form (SF 450)	57 FR 12845	Apr. 13, 1992
36. Agency ethics training reg. correction	57 FR 15219	Apr. 27, 1992

OGE ISSUANCE	FED. REG. CITATION	DATE PUBLISHED
37. Semiannual OGE regulatory agenda	57 FR 17516-17520	Apr. 27, 1992
38. Financial disclosure reg. correction	57 FR 21854-21855	May 22, 1992
39. Interim OGE Equal Access to Justice Act rule	57 FR 33267-33272	July 28, 1992
40.*Final ethical conduct standards reg. (part 2635)	57 FR 35006-35067	Aug. 7, 1992
41. Ethical conduct standards correction	57 FR 48557	Oct. 27, 1992
42. Semiannual OGE regulatory agenda	57 FR 52186-52190	Nov. 3, 1992
43. Ethical conduct standards correction/corr.	57 FR 52583	Nov. 4, 1992
44. Agency ethics training reg. amendments (subpart G of part 2638)	57 FR 58399-58400	Dec. 10, 1992
45. Agency Ethics training reg. amends. correction	57 FR 61612	Dec. 28, 1992
46. Old post-employment reg. amendments (part 2637)	57 FR 62467-62468	Dec. 31, 1992
47. Financial disclosure reg. correction	57 FR 62605	Dec. 31, 1992
48. Updated OGE SES performance rev. bd. notice	58 FR 14225-14226	Mar. 16, 1993
49. Semiannual OGE regulatory agenda	58 FR 25146-25150	Apr. 26, 1993
50.*Paperwork notice/OGE Form 201 revisions (access to SF 278s & other covered records)	58 FR 26790-26791	May 5, 1993
51. FTC interim supp. standards (OGE concurred)	58 FR 30695-30696	May 27, 1993
52.*Paperwork notice/SF 278 revisions (new ed.)	58 FR 32359-32360	June 9, 1993
53. OPIC interim supp. standards (OGE concurred)	58 FR 33319-33320	June 17, 1993

OGE ISSUANCE	FED. REG. CITATION	DATE PUBLISHED
54. Agency component designation amendments (part 2641 new post-employment reg.)	58 FR 33755-33756	June 21, 1993
55. OGE internal part-time career employ. policy	58 FR 34283-34284	June 24, 1993
56.*Financial disclosure reg. amendments (part 2634)	58 FR 38911-38913	July 21, 1993
57. FDIC interim supp. fin. discl. (OGE concurred)	58 FR 39625-39628	July 26, 1993
58. Treasury proposed supp. standards (OGE concurred)	58 FR 41193-41203	Aug. 3, 1993
59. ICC final supp. standards (OGE concurred)	58 FR 41989-41991	Aug. 6, 1993
60. PRC interim supp. standards (OGE concurred)	58 FR 42839-42841	Aug. 12, 1993
61. Proposed financial disclosure reg. amendments (part 2634)	58 FR 46096-46097	Sept. 1, 1993
62. DOD interim supp. standards (OGE concurred)	58 FR 47619-47624	Sept. 10, 1993
63. CFTC final supp. standards (OGE concurred)	58 FR 52637-52639	Oct. 12, 1993
64. Internatl. ethics conf. notice (USIA & OGE)	58 FR 53994-53995	Oct. 19, 1993
65.*Final financial disclosure reg. amendments (part 2634)	58 FR 63023-63024	Nov. 30, 1993
66. Technical corrections/updating to OGE regs.	58 FR 69176	Dec. 30, 1993
67. Grace period extension: two standards (§§ 2635.403(a) & 2635.803)	59 FR 4779-4780	Feb. 2, 1994

5 C.F.R. SUPPLEMENTAL AGENCY ETHICS REGULATIONS: CHAPTER & PART # ASSIGNMENTS AND STATUS

(Key to Agency Regs.: S = Standards of Ethical Conduct; FD = Financial Disclosure)

AGENCY	CHAPTER NO.		PARTS	SUPP. REG. PUBLISHED FED.REG. /		TYPE
1. **Treasury**	**XXI**	**(21)**	**3100-3199**	**58 FR 41193-41203**	**(8/3/93)**	**S:Proposed**
2. **FDIC**	**XXII**	**(22)**	**3200-3299**	**58 FR 39625-39628**	**(7/26/93)**	**FD:Interim**
3. DOE	XXIII	(23)	3300-3399			
4. FERC	XXIV	(24)	3400-3499			
5. Interior	XXV	(25)	3500-3599			
6. **DOD**	**XXVI**	**(26)**	**3600-3699**	**58 FR 47619-47624**	**(9/10/93)**	**S:Interim**
7. Commerce	XXVII	(27)	3700-3799			
8. Justice	XXVIII	(28)	3800-3899			
9. FCC	XXIX	(29)	3900-3999			
10. VA	**XXX**	(30)	4000-4099			
11. FCA	XXXI	(31)	4100-4199			
12. ACTION	XXXII	(32)	4200-4299			
13. **OPIC**	**XXXIII**	**(33)**	**4300-4399**	**58 FR 33319-33320**	**(6/17/93)**	**S:Interim**
14. SEC	XXXIV	(34)	4400-4499			
15. OPM	**XXXV**	(35)	4500-4599			
16. TDPOB	**XXXVI**	(36)	4600-4699			
17. USIA	XXXVII	(37)	4700-4799			
18. OSHRC	XXXVIII	(38)	4800-4899			
19. State	**XXXIX**	(39)	4900-4999			
20. **ICC**	**XL**	**(40)**	**5000-5099**	**58 FR 41989-41991**	**(8/6/93)**	**S:Final**
21. **CFTC**	**XLI**	**(41)**	**5100-5199**	**58 FR 52637-52639**	**(10/12/93)**	**S:Final**
22. DOL	XLII	(42)	5200-5299			
23. NSF	XLIII	(43)	5300-5399			
24. SBA	XLIV	(44)	5400-5499			
25. HHS	**XLV**	(45)	5500-5599			
26. **PRC**	**XLVI**	**(46)**	**5600-5699**	**58 FR 42839-42841**	**(8/12/93)**	**S:Interim**
27. **FTC**	**XLVII**	**(47)**	**5700-5799**	**58 FR 30695-30696**	**(5/27/93)**	**S:Interim**
28. NRC	XLVIII	(48)	5800-5899			
29. FLRA	XLIX	(49)	5900-5999			
30. DOT	L	(50)	6000-6099			
31. PBGC	LI	(51)	6100-6199			
32. Eximbank	LII	(52)	6200-6299			

AGENCY	CHAPTER NO.		PARTS	SUPP. REG. PUBLISHED FED.REG. / TYPE
33. Education	LIII	(53)	6300-6399	
34. EPA	LIV	(54)	6400-6499	
35. CPPBSD	LV	(55)	6500-6599	
36. NTSB	LVI	(56)	6600-6699	
37. GSA	LVII	(57)	6700-6799	
38. BGFRS	LVIII	(58)	6800-6899	
39. NASA	LXIX	(59)	6900-6099	
40. USPS	LX	(60)	7000-7099	
41. NLRB	LXI	(61)	7100-7199	
42. EEOC	LXII	(62)	7200-7299	
43. IAF	LXIII	(63)	7300-7399	
44. RTC	LXIV	(64)	7400-7499	
45. HUD	LXV	(65)	7500-7599	
46. NARA	LXVI	(66)	7600-7699	
47. Peace Corps	LXVII	(67)	7700-7799	
48. FMC	LXVIII	(68)	7800-7899	
49. TVA	LXIX	(69)	7900-7999	
50. DNFSB	LXX	(70)	8000-8099	
51. CPSC	LXXI	(71)	8100-8199	
52. EOP	LXXII	(72)	8200-8299	
53. USDA	LXXIII	(73)	8300-8399	
54. FMSHRC	LXXIV	(74)	8400-8499	
55. NEH	LXXV	(75)	8500-8599	
56. FRTIB	LXXVI	(76)	8600-8699	
57. OMB	LXXVII	(77)	8700-8799	
58. AID	LXXVIII	(78)	8800-8899	
59. FMCS	LXXIX	(79)	8900-8999	

Office of Government Ethics
(7/93)

Form Approved: OMB No. [illegible]

Request to Inspect or Receive Copies of SF 278 Executive Branch Personnel Public Financial Disclosure Report or Other Covered Record

I. Application	Agency Use Only
1. Applicant's name and address (please print)	2. Date.
1a. Office Telephone Number ( ) ____ ext (Optional)	3. Occupation
4. If application is for or on behalf of any other person or organization, give the other's name:	4a. Address of the other person or organization

5. ☐ Copy of the Public Financial Disclosure Report Form SF 278 requested for the following named individual(s). Certain other types of records ("covered records") can also be requested using this form (See Part III below). If you are requesting another covered record, check this box ☐ and specify which type of record(s): _____

a.	d.
b.	e.
c.	f.

6. Applicant's signature

II. Notice of Action

☐ Copies of the report(s) or other covered record(s) you requested are enclosed. See the **Important Notice** below.

☐ Your request does not comply with the requirements of the statute. Please complete **Part I** of this form and return so we may comply with your request.

☐ Other. Explanation:

☐ Fees. If applicable, amount _____ (when fees are required, make out a check payable to the U.S. Treasury and send it to the executive branch agency processing this request form)

A. Important Notice

The law and implementing OGE regulations require that a report or other covered record not be available to any person except upon written application by such person stating his or her name, occupation and address, and that the person be aware of the prohibitions on improper use, set forth below.

Section 105(c) of the Ethics in Government Act of 1978, as amended and 5 C.F.R. 2634.603(f) of the implementing OGE regulations provide that it is unlawful for any person to obtain or use a report:

(1) for any unlawful purpose;

(2) for any commercial purpose, other than by news and communications media for dissemination to the general public;

(3) for determining or establishing the credit rating of any individual; or

(4) for use, directly or indirectly, in the solicitation of money for any political, charitable, or other purpose.

The Attorney General may bring a civil action against any person who obtains or uses a report for any such prohibited purpose as set forth above. The court may assess against such a person a penalty in any amount not to exceed $[illegible]. Such remedy shall be in addition to any other remedy available under statutory or common law.

[illegible]

B. Privacy Act Statement

Section 105 of the Ethics in Government Act of 1978, as amended (5 U.S.C. App.) and 5 C.F.R. 2634.603 authorize the solicitation of the information requested in this form. The primary use of the information on this form is to permit officials of the recipient agency to consider and process your request for inspection or receipt of a copy(ies) of the SF 278 Executive Branch Personnel Public Financial Disclosure Report form(s) or other covered record(s) to which you seek access. Failure to furnish the information, except for your office telephone number (which is an optional item of information to be used to assist in contacting you about your request), will result in this agency's inability to allow access to, or to provide copies of, the financial disclosure report form(s) or other record(s) requested. Otherwise, furnishing the requested information is voluntary. The information on this form itself may be publicly disclosed pursuant to proper request under section 105(b) of the Ethics Act or as otherwise authorized by law.

Additional disclosures of the information on this form may be made:

(1) to a Federal, State or local law enforcement agency if the disclosing agency becomes aware of a violation or potential violation of law or regulation;

(2) to a court or party in a court or Federal administrative proceeding if the Government is a party or in order to comply with a judge - issued subpoena;

(3) to a source when necessary to obtain information relevant to a conflict of interest investigation or decision;

(4) to the National Archives and Records Administration or the General Services Administration in records management inspections;

(5) to the Office of Management and Budget during legislative coordination on private relief legislation; and

(6) in response to a discovery request or for the appearance of a witness in pending judicial or administrative proceeding, if the information is relevant to the subject matter.

See also the OGE/GOVT - 1 executive branch - wide Privacy Act system of records.

C. Public Burden Information

Public burden reporting for this collection of information is estimated to take approximately ten minutes per response, including time for reviewing instructions, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding the burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Associate Director for Administration, U.S. Office of Government Ethics, Suite 500, 1201 New York Avenue, NW., Washington DC 20005-3917; and to the Office of Management and Budget, Paperwork Reduction Project (3209-0002), Washington, DC 20503. **Do not** file this form with these offices; rather, file it with the appropriate office of the executive branch department or agency from which you are seeking access to a financial disclosure report or other covered records.

III. Other Covered Records

In addition to requests for access to public SF 278 reports, this form can also be used to request access to certain other agency records which are covered under the access procedures of section 105 of the Ethics Act and the implementing OGE regulations ("covered records"). Such other covered records are certificates of divestiture, 18 U.S.C. 208(b)(1) & (3) waivers granted by the recipient agency (after deletion of any material withholdable pursuant to the Freedom of Information Act, 5 U.S.C. 552 (see 18 U.S.C. 208(d)(1)), and other OGE Form 201s. If you seek access to any such additional record(s), check the second box in Part I.5 on the front page and specify the record(s) sought.

United States
Office of Government Ethics
1201 New York Avenue, NW., Suite 500
Washington, DC 20005-3917

April 15, 1994

The Honorable Carl Levin
Chairman
Subcommittee on Oversight of
Government Management
Committee on Governmental Affairs
United States Senate
Washington, DC 20510-6250

The Honorable William S. Cohen
Ranking Minority Member
Subcommittee on Oversight of
Government Management
Committee on Governmental Affairs
United States Senate
Washington, DC 20510-6250

Dear Senator Levin and Senator Cohen:

As we promised in our letter of March 14, 1994, this letter responds to those questions you posed in your January 28, 1994 letter that would require our views on possible legislation. The questions and our answers are set forth in the enclosure to this letter.

The Office of Management and Budget advises that there is no objection from the standpoint of the Administration's program to the submission of this letter.

Sincerely,

Stephen D. Potts

Stephen D. Potts
Director

Enclosure

4. . . . . **Having recently handled a presidential transition, are there any legislative or administrative changes that OGE would recommend to facilitate future transitions?**

In our March 14 letter, we indicated that there were no administrative changes we would recommend for our program. And, specific to our program alone, we have no recommendations as to legislative changes. However, having said that, we recognize that the status of transition staff and the teams of an incoming nonincumbent President vis-a-vis the conflicts and information statutes has and will continue to cause concern. The Presidential Transition Act does not speak to this issue. At some other time, in some broader forum, that issue might be an appropriate item of discussion. Finally, we believe that the Administration and the Congress should continue to work on eliminating and/or consolidating the many forms required to be filed by Presidential nominees, especially those requiring substantially the same information but in a different format.

5. . . . . **Would OGE support repealing or modifying the requirement that requestors [of copies of public financial disclosure reports] disclose their identity?**

We assume your question has arisen because of some concern on the part of requestors that Government officials will in some way retaliate against a requestor for seeking that information. OGE has not experienced nor have agencies reported any such alleged problems arising out of this requirement. Given the personal information that must be reported by the Government official and the potential misuse to which that information can be put, we believe requiring the person who wishes to see that information make a publicly available request is a minimal trade-off. If a Government employee does act inappropriately with regard to an individual simply because that individual had requested a copy of the employee's public financial disclosure report, we believe there are appropriate means of dealing with such conduct without eliminating the public request provision.

8. **As you know, a special committee of the ABA issued a report calling for reforms in federal ethics law. Please state whether OGE would support the following legislative changes, and why or why not:**

-- **Amending Section 207(a) to prohibit "aiding or advising," as well as contacts with one's former agency;**

In its report entitled "Keeping Faith: Government Ethics & Government Ethics Regulation," the American Bar Association's Committee on Government Standards recommends that 18 U.S.C. §§ 207(a)(1) and (a)(2) be amended to prohibit former executive branch employees from rendering "behind-the-scenes" aid or advice

in connection with particular matters involving specific parties with which they were involved while serving with the Government. Currently, these sections only prohibit post-employment assistance that involves a communication to or appearance before an employee of a Federal department, agency, or court.

The ABA report identifies two potentially "unethical" advantages possessed by the former employee seeking to provide assistance to others. First, the former employee is likely to be able to take advantage of "inside information" concerning the workings of his former employer. Second, he may likely be in a position to make use of continued personal influence with his former colleagues. While recognizing that the current law addresses to a significant degree the improper use of continuing personal influence, the drafters of the ABA report express concern that the current law "does almost nothing to curtail the improper use of sensitive information about, and insights into, the particular matter that the individual gained during her government employment." Thus, the report points out that 18 U.S.C. § 207(a) permits a former employee to pass on inside information to others provided that it is not the former employee who actually communicates with or appears before Government personnel.

We do not recommend the amendment of 18 U.S.C. § 207(a) at this time. Aside from the representations of the ABA committee, we have no indication that a substantial problem exists relating to the misuse of "inside information" by former employees. Before amending the statute so soon after the effective date of the Ethics Reform Act of 1989 modifications, we would want to be convinced that an alternative approach would not be feasible, such as one identifying a specified category of information to be protected. Indeed, we cannot say whether the general public would agree with the ABA's expansive definition of "inside information." Would the average member of the public perceive an abuse of former Government position when a former employee specifies the agency officials who should be contacted concerning a particular issue, an abuse deemed obvious by the ABA special committee?

The ABA report correctly points out that other Federal ethics laws currently prohibit behind-the-scenes post-employment conduct. However, we do not feel we have sufficient data to conclude that the existence of these statutory restrictions "demonstrates the feasibility of restricting such conduct without any disastrous effect on recruiting talented individuals to government service." These other restrictions are of more limited applicability. Moreover, we recall that 18 U.S.C. § 207(b)(ii) extended to behind-the-scenes assistance as originally enacted by the Ethics in Government Act of 1978, but that it was quickly amended to narrow its scope in light of presumably well-founded fears relating to retention and recruiting.

The ABA report also points out that 18 U.S.C. § 207(b) and (f) prohibit behind-the-scenes aid or advice. As OGE has gained more experience in defining the scope of these two new restrictions since they became effective in 1991, we are also increasingly aware of how difficult it is to define the limits of the terms "aid" or "advise." This difficulty is closely related to the Government's ability to discover apparent violations of behind-the-scenes' restrictions and its ability to successfully prosecute them. We expect that the Department of Justice has had insufficient time to evaluate its ability to enforce the new aiding or advising restrictions.

In sum, we do not recommend the amendment of 18 U.S.C. § 207(a) to extend to aiding or advising. The major revision of 18 U.S.C. § 207 enacted by the Ethics Reform Act of 1989 has been in effect for little more than three years, and we do not believe the ABA report offers a sufficient basis to warrant consideration of another significant amendment of 18 U.S.C. § 207(a) so soon.

-- **Abolishing Section 209 and relying instead on the bribery and illegal gratuities laws;**

The special committee report calls for abolishing the crime of "salary supplementation." In the words of the report

> [A]s currently written and interpreted, § 209 does more harm than good. With respect to payments that most directly jeopardize the integrity of Government--those made with the corrupt expectation of changing official behavior--§ 209 is surplusage. . . . Uncertain in scope, and threatening to criminalize some payments made in complete good faith for the best of motives while ignoring certain other far less innocuous payments, it lacks the characteristics of Clarity of Purpose, Moral Resonance and Proportionality--characteristics that are particularly important in *criminal* ethics statutes.

The Report also expresses the view that payments "that might arguably constitute compensation for official services are best handled through civil and administrative mechanisms."

While we agree that section 209 is not a model of clarity we do not agree with the ABA special committee that the harm that is intended to be addressed by section 209 would best be handled through civil and administrative mechanisms. We believe there are payments that should not have to rise to the level of bribes or criminal gratuities to be considered inappropriate for Government officials to receive. "Congress appropriately enacts prophylactic rules that are intended to prevent even the appearance of

wrongdoing and that may apply to conduct that has caused no actual injury to the United States. Section 209(a) is such a rule."[1]

The policies behind 18 U.S.C. § 209 are set forth in a report prepared in 1960 by the Association of the Bar of the City of New York.

> The rule is really a special case of the general injunction against serving two masters. Three basic concerns underlie this rule prohibiting two payrolls and two paymasters for the same employee on the same job. First, the outside payor has a hold on the employee deriving from his ability to cut off one of the employee's economic lifelines. Second, the employee may tend to favor his outside payor even though no direct pressure is put on him to do so. And, third, because of these real risks, the arrangement has a generally unwholesome appearance that breeds suspicion and bitterness among fellow employees and other observers. The public interpretation is apt to be that if an outside party is paying a Government employee and is not paying him for past services, he must be paying him for some current services to the payor during a time when his services are supposed to be devoted to the Government.

Association of the Bar of the City of New York, Conflict of Interest and Federal Service 211 (1960).

The third reason listed above cannot be dismissed easily, particularly the effect inside the Government workforce of having individuals who work side-by-side at the same job receiving substantially different compensation for that job (depending upon whether they have "patrons" or rely totally on the Government for their compensation). Further, such arrangements in tight budgetary times might place inappropriate pressures on agencies to look less carefully at the source of payments to "needed" employees who would not otherwise be available to the Government if not for the private compensation arrangements.

We believe that at some future date, the language of section 209 should be revisited to make it more clear. In the meantime, OGE was charged under Executive Order 12674 with writing regulations interpreting section 209. Such regulations must be issued with the concurrence of the Department of Justice. We believe that those, when written, may be of assistance in interpreting this statute. If they do not, then some amendment to section 209 should be considered at that time.

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[1] Crandon v. U.S., 108 L.Ed.2d 132, at 143.

-- **Cutting back on the number of officials required to file public financial disclosure;**

The principal recommendation by the ABA special committee in this regard was to limit public disclosure to senior noncareer positions. While we believe that financial interests for career employees can be adequately scrutinized and preventive measures imposed through the use of a confidential disclosure system, the public financial disclosure system has a two-fold purpose. That second purpose, providing the public with an opportunity to make its own conclusions on conflicts for those in the highest positions of Government, would be lost if high-level career officials were not required to file public reports. We believe that the availability of these reports to the public is a considerable element in maintaining the public's confidence in those officials' actions. And, it has the additional effect of helping to ensure that the highest career officials continue to review carefully their own financial holdings with a critical eye toward apparent conflicts. Once having done so for themselves they may also be more sensitive to the potential conflicts of their subordinates and then better able to carry out their management responsibilities.

The ABA committee noted that for political appointees the reporting requirements are a "passing affliction" but for the career employees "the aggravation is chronic." We believe the choice of words unfortunate because it sounds as if that is also how public service is viewed. The report sets forth the proposition that while the individual burden of disclosure is greater for these employees, the public benefit of disclosure is less because the political appointees' commitment to Government service is consciously transitory and they are likely to maintain financial connections to persons and entities outside Government which bear more close public scrutiny. Career officials on the other hand anticipate annual review and are more likely to manage their finances to minimize questions or problems. The report bases these statements on the fact that the reports of political appointees are requested by the public in far greater numbers than those of career officials.

The report is correct about the requests to view financial disclosures by the public. Reports of political officials are requested in far greater numbers. However, we believe that supports only a conclusion that the public (generally the press) is interested in knowing what the political officials are maintaining, not that they are more likely to maintain potential conflicts. Granted, more so than the political official new to the Government the career official may be far more likely to understand and thus avoid financial connections that will cause problems. On the other hand one could argue that it is more important for the public to have an opportunity to view the career official's report whenever they wish because the career official's report has been subject to far less stringent internal review at the outset than that of a

Presidential appointee who has gone through a confirmation process with a review of his or her financial report by the agency, OGE and the confirming committee. The fact that the public does not request the reports of career officials may also argue that the requirement is not as onerous as it might at first blush appear.

The public financial disclosure system was instituted by the Ethics in Government Act of 1978, largely as a response to Watergate. It constitutes an invasion of employees' personal privacy, as well as that of their spouse and dependent children. The courts have upheld that compromise of privacy, because of the legitimate purpose served (DuPlantier v. U.S., 606 F.2d 654, 5th Cir. 1979). However, even though Constitutional, any invasion of privacy should be limited in scope to those situations where the interest to be served clearly outweighs the privacy concerns of employees and their spouse and dependent children. As the ABA committee report notes, "respect for Government employees as fellow citizens requires acknowledging their legitimate interest in preserving a personal life apart from the public domain, and taking care that they are not lightly required to surrender this interest." We do not believe, however, that the elimination of all public reporting on the part of career officials, many of whom have authority in the Government equivalent to that of many political officials, is the only appropriate response to this concern. OGE had in the past recommended that certain of the requirements for public financial disclosure by all employees be modified because such information was not necessary to make a determination of an actual or apparent conflict. While those recommendations were not accepted at that time, that is still, we believe, a viable option when the climate for amendments to the disclosure laws changes.

Finally, as to the level of seniority at which noncareer employees should be faced with public financial disclosure, we believe that the current cutoff at "above GS-15" or the equivalent is an appropriate demarkation.

-- **Making additional changes to tax law to minimize the adverse tax consequences for nominees who divest certain assets.**

Section 1043 has proved an effective tool for what it was designed to accomplish -- deferral of capital gains taxes in the case of divestiture of capital assets pursuant to ethics program or congressional determinations. We are aware, however, that concerns are sometimes raised when parties are required to divest vested pension or other employee benefits or arrangements to which section 1043 does not apply.

Section 1043 relates to gain deferral, not to the treatment of ordinary anticipated income items including distributions from pension plans. For various technical reasons, such as its basis

adjustment mechanism, section 1043 is not expandable to include such ordinary income receivables.

In a limited number of instances, we believe nominees would have benefitted from additional provisions in the tax laws that would ameliorate the immediate costs of divesting financial arrangements that result in ordinary income; we have not seen a general need, however. Therefore we have not and have no plans to seek actively such a change. Furthermore, any such change would be difficult to draft to meet all of the perceived needs. For instance, at a minimum, we believe it would have to be designed with two overriding technical objectives. First, the scheme should not alter the timing of payments to an official established pursuant to a schedule under a bona fide plan so as to leave the Government official with a cash payout ahead of the time there would otherwise have been an entitlement to it. (This will not be of any assistance for those persons entering Government service who have not served the private-sector employer long enough for benefits to have vested and whose employer nonetheless wishes to make some payment.) Second, there should be a complete severance from linkages to the private-sector employer. That is, the payment must not come from the private sector employer or funds controllable or reachable by it or its creditors under any circumstances.

Finally, severance arrangements which include cash payments to departing employees for salaries payable, bonuses, deferred items, or the ordinary income component realized from the exercise of options will cause a separate area of concern. It seems excessive to give special relief in the case of ordinary income items to be realized within one year of entry into Government service. If any change is made, a balanced approach is needed to avoid granting benefits that the public would perceive as unwarranted and unfair.

12. Are there any other legislative changes or clarifications to any of the ethics laws which OGE believe need to be made?

OGE continues to support an amendment to the ban on honoraria which was enacted as a part of the Ethics Reform Act and is presently under review by the Supreme Court. (5 U.S.C. app § 501(b)).

That aside, given the number and complexity of the amendments to ethics statutes as a result of the Ethics Reform Act, we believe the executive branch ethics program and the public would be far better served by allowing an adequate period of time to pass in which to judge the effectiveness of these statutes as now written. That is not to say that these statutes are models of clarity and could not be improved with some language changes. We have not found these "glitches" so substantial that we have been unable to deal with the questions they raise administratively. Therefore, we

recommend no substantive changes to ethics statutes other than that dealing with honoraria.

We do recommend, however, the elimination of a responsibility of OGE that was enacted during the last session congress. In Section 19 of Public Law 103-204, the Resolution Trust Completion Act, OGE was, we believe inadvertently given a role in developing rules of conduct for private FDIC contractors who are not acting in any employee-type role. (12 U.S.C. § 1822(f)(3)). Our focus and our expertise, as you know, is on the conduct of employees and employees hired by contract. Limitations on the activities of independent contractors should be dealt with as contract requirements. The interests of the Government in the services provided by contractors is different than that of the services it expects of employees and should not be confused. We do not believe that OGE has an appropriate role in this matter. Therefore we request that this requirement be eliminated. We are concerned that this misunderstanding of OGE's role will be more harmful to the Government in this regard than it will be helpful. If the conduct of contractors is not controlled by the terms of the contract itself or by statute, there will be no effective control mechanism.

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U.S. Department of Justice

Office of the Independent Counsel

March 15, 1994

Jane S. Ley
Deputy General Counsel
U.S. Office of Government Ethics
Suite 500
1201 New York Avenue, N.W.
Washington D.C 20005

Dear Ms. Ley.

You have informed us that the Secretary of the Treasury and Representative James Leach have each asked your Office to conduct an inquiry and issue an opinion regarding whether meetings that occurred between individuals at the Treasury and White House personnal regarding the RTC's investigation of Madison Guaranty violated any ethical rules or guidelines. You have asked us whether we have any objection to your Office conducting such an inquiry.

As you know our Office is currently conducting an investigation into the events surrounding these meetings and other contacts between the Treasury and the White House. We have no right to instruct you to either make or not to make such an inquiry. We are, therefore, not giving you any such instruction. However, it is our view that such an inquiry, which we understand would include interviews of relevant witnesses, would be detrimental to the investigation currently being conducted by my office. It is, therefore, our preference that your inquiry not go forward until our investigation is complete. As you have requested, we will provide notice to you when our investigation is complete.

Sincerely Yours,

ROBERT B. FISKE, JR.
Independent Counsel

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